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GOODEVE'S
MODERN LAW
OF
PERSONAL PROPERTY

SEVENTH EDITION

REVISED AND PARTLY RE-WRITTEN

BY

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Trinity Hall,
Cambridge.
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MIDDLE TEMPLE

THE MODERN LAW
OF
PERSONAL PROPERTY.

CHAPTER I.

PROPERTY—POSSESSION.

§ 1. *Property.*

Classes of property.

ACCORDING to English law, property is divided into real and personal (*a*), personal property being again subdivided into chattels real and chattels personal. Real property and chattels real are interests in land, and in this treatise we shall confine ourselves to the consideration of chattels personal, that is, personal property other than interests in land.

Chattels personal: corporeal: incorporeal.

The term "property" may be used to denote either things which are the subjects of rights, or the rights themselves. If we consider chattels personal according to their nature, we may divide them into, (1) corporeal chattels, *i.e.*, those which have an actual physical existence, which are tangible, such as money in specie, furniture, cattle, ships, and timber or minerals when severed from the land, and (2) incorporeal chattels, *i.e.*, those which have a mere notional existence, such as debts, including cash at a bank, Government stocks, shares and debentures of companies, patents and copy-

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(*a*) For the meaning of the term "property," and the origin and significance of the division into real and personal, see Goodeve and Potter's Real Property, Introductory Chapter.

rights. On the other hand, if we consider them according to the rights which can be exercised over them, it is convenient to divide them into things of which the owner has actual or potential possession and which he can transfer by physical delivery, and things not in the actual or potential possession of the owner, things not capable of physical delivery. Personal chattels of the former class are called " choses in possession "; those of the latter class " choses in action " (*b*).

Choses in possession. Choses in action.

"Goods and chattels."

The words " goods and chattels " (*c*), at the time when these terms were introduced into English law, were used to embrace all property not included under one or other of the terms " lands, tenements, and hereditaments " technically descriptive of real property (*d*); and they are used in that sense at the present day as equivalent to personalty.

The word " chattel " is derived through Norman-French from the Latin *capitale*, meaning property, capital. Coke says (*e*) : " ' Goods,' *biens*, *bona*, includes all chattels as well real as personal. ' Chattels ' is a French word and signifies goods, which by a word of art we call *catalla*." Blackstone tells us (*f*) that in the Grand Coustumier of Normandy the word " chattels " is used and set in opposition to a fief or feud, so that not

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(*b*) See *Colonial Bank* v. *Whinney* (1885), 30 Ch. D. 282. The different classes of choses in action are discussed, *post*, Chap. VIII.

(*c*) As to what passes by " goods and chattels " in a grant, see Shep. Touch. 97, 98; and in a will, *Kendall* v. *Kendall* (1828), 4 Russ. 370; 28 R. R. 125; that the phrase, as used in all Bankruptcy Acts from that of James I downwards, includes choses in action, see *Colonial Bank* v. *Whinney* (1885), 30 Ch. D. 280; and see the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 167. Choses in action are not included in " goods, wares, and merchandises " as used in the Statute of Frauds (29 Car. 2, c. 3), s. 17; *Humble* v. *Mitchell* (1839), 11 A. & E. 205; nor in the word " goods " in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), and in the Factors Act, 1889 (52 & 53 Vict. c. 45); and probably not in " goods," in the Mercantile Law Amendment Act (19 & 20 Vict. c. 97); nor in " personal chattels " in the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4.

(*d*) For the explanation of these terms, see Goodeve & Potter, pp 10 *et seq*.

(*e*) Co. Litt. 118*b*.

(*f*) 2 Bl. 385.

only goods but whatever was not a feud were accounted chattels.

> "The words '*bona et catalla*,' jointly or separately in our ancient statutes and law writers, denote personal property of every kind, as distinguished from real. Thus *Magna Charta*, c. 18 (*sic*), which provides that the King's debt shall be first paid, and the residue remain to the executors of the debtor, uses the words *bona et catalla*. . . . So the statute 31 Ed. 3, stat. 11, c. 1, which is in French, directs the ordinary to depute the next friends of an intestate to administer his goods, *biens*, and then proceeds to enact that the persons deputed may have an action to recover, as executors, the debts due to the intestate (*g*).

Choses in possession and in action distinguished.

The distinction between choses in possession and choses in action has always been recognised by our law (*h*); and the following points of difference may be here specially noted.

At common law, choses in possession have always been capable of being assigned by delivery, or by deed. On the other hand, choses in action were (with a few exceptions) incapable at common law of being assigned.

Prior to the Married Women's Property Act, 1882 (*i*), a wife's choses in possession, to which she was entitled in her own right, vested absolutely in her husband on the marriage. Her choses in action, if the husband reduced them into possession by receiving them or recovering them by action, belonged to him; if he did not reduce them into possession, and the wife survived him, they remained her property. If the husband survived the wife, he was entitled to them, but could claim them only after taking out letters of administration to her estate (*k*).

Choses in possession could at common law be seized by the sheriff in execution of judgments under a writ

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(*g*) Per Abbott, C.J., *Bullock* v. *Dodds* (1818), 2 B. & Ald. 276; 20 R. R. 420.

(*h*) See per Lord Blackburn, *Colonial Bank* v. *Whinney* (1886), 11 App. Cas. 439; Bract. lib. 1, c. 12, para. 3, fol. 7*b*, and lib. 2, c. 4, para. 2, fol. 10*b*.

(*i*) 45 & 46 Vict. c. 75.

(*k*) See this explained per Cotton, L.J., in *Smart* v. *Tranter* (1890), 43 Ch. D. 587, 592.

of *fieri facias*; choses in action could not, prior to the Judgments Act, 1838 (*l*), be taken in execution.

Property absolute, qualified, or possessory.

The rights which a man may have in chattels personal may be absolute, qualified, or possessory. He may have absolute property in inanimate objects, including trees and vegetables, when separated from the land, and in animals *domitæ naturæ*, namely, those which we generally see tame and but rarely wandering at large; and, if an animal of this nature strays from his owner and is lost, the owner does not lose the property in it (*m*).

Animals.

But a man cannot have absolute property in animals *feræ naturæ*. Coke says (*n*):—

> "Property qualified and possessory a man may have in those which are *feræ naturæ*; and to such property a man may attain by two ways, by industry, or *ratione impotentiæ et loci*; (1) by *industry*, as by taking them, or by making them *mansueta*, *i.e.*, *manui assueta*, or *domestica*, *i.e.*, *domui assueta*; but in those which are *feræ naturæ*, and by industry are made tame, a man hath but a qualified property in them, *scil.* so long as they remain tame, for if they do attain to their natural liberty, and have not *animum revertendi*, the property is lost; (2) *ratione impotentiæ et loci*: as if a man has young shovelers or goshawks, or the like, which are *feræ naturæ*, and they build in my land, I have possessory property in them, for if one takes them when they cannot fly, the owner of the soil shall have an action of trespass. *Quare boscum suum fregit, et tres pullos espervor' suor'*, or *ardear' suar' pretii tantum, nuper in eod' bosco nidificant', cepit, et asportav'*; and therewith agreeth the Regist. and F. N. B. 86, L., and 89, K.; 10 Ed. 4, 14; 18 Ed. 4, 8; 14 H. 8, 1 *b.*; Stamf. 25 *b.* &c.; *vide* 12 H. 8, 4, and 18 H. 8, 12."
>
> "But when a man hath savage beasts *ratione privilegii*, as by reason of a park, warren, &c., he hath not any property in the deer, or conies, or pheasants, or partridges, and therefore in an action, *Quare parcum, warrennum, &c., fregit et intrav' et 3 damas, lepores, cuniculos, phasianos, perdices, cepit et asportavit*, he shall not say *suos*, for he hath no property in them, but they do belong to him *ratione privil'*, for his game and pleasure, so long as they remain in the privileged place."

(*l*) 1 & 2 Vict. c. 110.

(*m*) *Ireland* v. *Higgins* (1588), Cro. El. 125; Ow. 93. See also *Chambers* v. *Warkhouse* (1692), 3 Lev. 336.

(*n*) *The Case of Swans* (1592), 7 Rep. 17*b*. See the passage in the text commented on by Lord Westbury, C., *Blades* v. *Higgs* (1865), 11 H. L. C. 631.

Game.

The word "property," when applied to animals *feræ naturæ*, including game, while they continue in their wild state, means no more than the exclusive right to catch, kill, and appropriate such animals; and this right is said to exist either *ratione soli* or *ratione privilegii.*

If a man starts game on his own land and pursues it into the lands of another, and there kills it, the property remains in himself (*o*).

Game killed without authority.

When game is taken or killed by a person without authority from the person entitled to do so, the rules at common law are the following (*p*):—

(1.) If A. starts game on the lands of B., and takes and kills it there, it belongs to B.

(2.) If A. starts game on the lands of B., and takes and kills it on the lands of C., it belongs to A. (although he is a wrongdoer).

(3.) If A. starts game in a forest or warren belonging to B., and kills it on the lands of C., it belongs to B.

Of these rules, (1) and (2) appear to apply to all animals *feræ naturæ* at the present day. Mr. J. Williams (*q*) doubts whether the second rule has not been altered by the Game Act, 1831 (*r*), s. 36.

At the present day, the occupier of land has, subject to any rights reserved by contract, and to the rights of the owner of a forest or warren, the right to take and kill game (*s*). By the Ground Game Act, 1880 (*t*), the right to take and kill ground game (*i.e.*, hares and rabbits) is vested in the occupier of the land, as incident to and inseparable from his occupation, concurrently with any other person entitled so to do.

Movables and immovables.

Property can also be divided into immovable and

(*o*) 2 Bl. 419.

(*p*) *Blades* v. *Higgs*, *sup.*

(*q*) Wms. P. P. (18th ed.), p. 169.

(*r*) 1 & 2 Will. 4, c. 32; *Rigg* v. *Earl of Lonsdale* (1856), 1 H. & N. 923.

(*s*) *Ib.*

(*t*) 43 & 44 Vict. c. 47, as amended by 6 Edw. 7, c. 21. See *Morgan* v. *Jackson*, [1895] 1 Q. B. 885; *Anderson* v. *Vicary*, [1900] 2 Q. B. 287.

movable things; immovable things consist of real property and chattels real; movable things consist of personal property exclusive of chattels real, and include choses in action.

Succession to movables on death.

The succession to movable property (*i.e.*, to personal property excluding leaseholds for years) on the death of the owner is, in general, regulated by the law of the country in which he is domiciled at the date of his death (*u*), not by the law of the country in which the property is situated; this is expressed by the maxim—"*mobilia sequuntur personam*" (*w*).

For instance, if a man dies domiciled in France, leaving movable property situated in England, the rights of the persons who become entitled to it on his death are determined by the law of France, not by that of England. It must not, however, be supposed that the law of France is of any authority in England; all that we mean is that it is part of the law of England that in this case the rights of the parties shall be determined by the rules of French law (*x*).

Leaseholds for years are, as a matter of fact, immovable and the maxim *mobilia sequuntur personam* does not apply to them. If they are situated in England, English law is applicable to them, and, on the death of the owner, the rights of all parties are determined by that law, not by the law of his domicil (*y*).

(*u*) *Enohin* v. *Wylie* (1862), 10 H. L. C. 1; *Ewing* v. *Orr-Ewing* (1883), 9 App. Cas. 34.

(*w*) *Whicker* v. *Hume* (1858), 7 H. L. C. 124; *Somerville* v. *Somerville* (1801), 5 Ves. 750; 5 R. R. 155; *Re De Nicols*, [1898] 2 Ch. 60; [1900] A. C. 21. The maxim "is a brief form of stating the principle that a person's movable property is for many purposes, and especially when it is dealt with as a whole, considered by a fiction of law as situated in the country where its owner is domiciled, and therefore subject to the laws of such country"; Dicey, Domicil, 167. But the effect of an individual assignment of movables is mainly governed by the law of the country where the thing is situated (*lex situs*): *ibid.* 157, 255; *Cammell* v. *Sewell* (1860), 29 L. J. Ex. 350; or where the transfer is made: *Alcock* v. *Smith*, [1892] 1 Ch. 238; *Embiricos* v. *Anglo-Austrian Bank*, [1905] 1 K. B. 677.

(*x*) See this discussed in an article by Professor Dicey, 6 Law Quarterly, 1.

(*y*) *Freke* v. *Carbery* (1873), 16 Eq. 461; *Duncan* v. *Lawson*

The student may have some difficulty in seeing how it is that the devolution of a chose in action on the death of the person entitled is determined by the law of his domicil. He may object that it can only be recovered by an action against the debtor, and that therefore the law of the place where that action has to be brought, presumably the place where the debtor is domiciled, or, perhaps, ordinarily resident, ought to prevail. No doubt that is the law which governs the procedure for recovery of the chose in action; but the question how the thing is to be recovered is different from the question what is to be done with it when recovered; and it is the latter question which has to be determined by the law of the domicil of the deceased creditor.

Personal property *i.e.*, movable property and chattels real, upon the death of the owner domiciled in England, in the absence of testamentary or other disposition, devolves upon an administrator appointed by the Court, and, after providing for the payment of the debts of the deceased, was (in the case of a person dying before January 1, 1926) distributed among his next of kin according to the Statutes of Distribution (*z*). In the case of persons dying on or after January 1, 1926, all property, real or personal, in the absence of testamentary or other disposition, devolves upon an administrator appointed by the Court, and, subject to payment of the debts of the deceased, is distributed in accordance with the provisions of the Administration of Estates Act, 1925, ss. 46-48 (*a*).

As a consequence of the feudal doctrine of tenure, by which all land in England was regarded as being in the absolute ownership of the Crown and as being held directly or indirectly from the Crown subject to certain

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(1889), 41 Ch. D. 394; *Pepin* v. *Bruyère*, [1902] 1 Ch. 24; *Re Moses*, [1908] 2 Ch. 235. But the expression "personal estate" in Lord Kingsdown's Act (24 & 25 Vict. c. 114) regarding wills of *British subjects* has been held to extend to leaseholds: *Re Grassi*, [1905] 1 Ch. 584.

(*z*) 22 & 23 Car. 2, c. 10; 1 Jac. 2, c. 17. See *post*, Chap. XIX.

(*a*) 15 Geo. 5, c. 23; see *post*, Chap. XIX.

No "estate" in chattels personal.

Settlements of personal property.

Executory bequests.

conditions of service, it was possible and usual for land to be held for a series of limited interests (called "estates") in succession. Movable property, that is, personal property (excluding chattels real), was never the subject of tenure, but of absolute ownership, and, therefore, could not and cannot be held for an "estate" (*b*). Although, in assigning an absolute interest in personal property, it has been usual to assign it to A., "his executors, administrators, and assigns," a conveyance to A. simply, without adding "his executors, administrators and assigns," is equally effectual. If it is desired to give only a limited interest, or to create interests in succession in personal property, the interposition of a trustee or trustees is necessary, and the whole legal interest is vested in him or them, the beneficial interests being defined by a declaration of the trusts upon which the property is to be held (*c*). In such cases, the legal ownership is in the trustees, and the interests of the beneficiaries, termed *cestuis que trust*, are equitable. For instance, supposing a man about to marry desires to settle a sum of stock for the benefit of his wife and the issue of the marriage, he transfers it into the names of trustees, and by the settlement declares that it shall be held by them on certain trusts, as for example, on trust to pay the income to his wife during the joint lives of himself and his wife, then to the survivor for life, and after the death of the survivor, on trust for the issue of the marriage on attaining majority, equally, or as the parents may appoint, with powers to provide for maintenance, education, and advancement in the meantime. But, in the case of disposition by will, the gift may be made directly to the successive takers, who, therefore, seem to take interests analogous to successive estates in land; but there can be no remainder in a chattel, real or personal; and in such cases the legal

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(*b*) The phrase "personal estate" is sometimes used to denote personal property, in contradistinction to real estate.

(*c*) For particulars of settlements of personalty, see Dean & Spurling's Students' Conveyancing, Chap. VI., s. 5.

view is that the whole property vests in the first taker and shifts on the determination of his interest to the person next entitled. Such dispositions are often called executory bequests; and the Court will interpose for the protection of the successive interests, and thus preserve the property during the subsistence of the limited interests for the benefit of the person entitled to the absolute interest (*d*).

The nature of the property may prevent the possibility of the creation of future interests; thus, under a specific gift of articles *quæ ipso usu consumuntur*, they vest absolutely in the tenant for life or first taker, unless personal use by the tenant for life is not contemplated, or unless they form part of a stock in trade (*e*); and even then the interest will be held to be absolute if the taker is not to be liable to account for any diminution or depreciation in the stock (*f*).

Estates tail.

The Statute of Westminster II. (1285), known as *De Donis Conditionalibus*, had the effect of creating a heritable interest in land, called an estate tail, by which when the land was granted to a man and "the heirs of his body," the donee was disabled from alienating the land so as to defeat the right of succession of his issue and the ultimate right of reverter to the lord in case of failure of issue. But by the adoption of certain fictitious processes, the Recovery and the Fine, it became possible to dispose of land so limited and, as it was termed, to "bar the entail." Equity, "following the law" in this matter, allowed similar interests to be created in equitable estates. The Fines and Recoveries Abolition Act, 1833 (*g*), provided a simple mode of barring entails by deed complying with the regulations contained in the Act (*h*).

(*d*) Jarman on Wills (ed. 6), Ch. 38, s. 3; L. Q. R., Vol. 24, p. 431.

(*e*) *Myers* v. *Washbrook*, [1901] 1 Q. B. 360; Jarman on Wills (ed. 6), Ch. 38, s. 3; and Theob. on Wills (ed. 8), Ch. 47, s. 1.

(*f*) *Breton* v. *Mockett* (1878), 9 Ch. D. 95.

(*g*) 3 & 4 Will. 4, c. 74.

(*h*) The history and details of the law relating to estates tail must be studied in works on Real Property.

Formerly a limited interest of the nature of an estate tail could not be created in personalty, whether the interest were legal or equitable; an attempt to do so had the effect of giving the absolute interest to that person who, if the subject-matter were realty, would be the first tenant in tail.

> "For," says Blackstone, "this, if allowed, would tend to a perpetuity, as the devisee or grantee in tail of a chattel has no method of barring the entail; and therefore the law vests in him at once the entire dominion of the goods."

Probably the true reason was that personal property was not a tenement within the meaning the Statute De Donis.

The Law of Property Act, 1925, however, now provides that an interest in tail may be created *by way of trust* in any property, real or personal, but only by the use of like expressions as those by which, before the Act, a similar estate tail could have been created by deed (*i*). The entail may be barred by a disentailing deed, which no longer requires to be enrolled in the Central Office of the Supreme Court (*j*); and the tenant in tail in possession when of full age, may dispose of the property by devise or bequest *specifically* referring to it in particular or to his entailed property generally (*k*).

Perpetuity.

The rule against perpetuities, that is, against deferring the vesting of an absolute interest in property beyond a limited period, applies equally to real and to personal property; and therefore personal property may not, any more than real property, be so disposed of as to render the *corpus* inalienable for a longer period than a life, or a number of lives, in being at the time of the disposition, and twenty-one years afterwards, with a further period of gestation where gestation in fact exists (*l*). But in the case of any instrument executed after 1925 or of the will of any person dying after that date, although

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(*i*) 15 Geo. 5, c. 20, s. 130.

(*j*) *Ib.*, s. 133.

(*k*) *Ib.*, s. 176.

(*l*) *Cadell* v. *Palmer* (1833), Tud. Conv. Cas. 578; *Re Bowles*, [1902] 2 Ch. 650; *Re Davies and Kent*, [1910] 2 Ch. 35.

made before that date, where the vesting either of capital or income of property is made to depend on the attainment, by the beneficiary or members of a class of beneficiaries, of an age exceeding twenty-one years and thereby the disposition would be rendered void for remoteness, the Law of Property Act, 1925, now provides (*m*) that the disposition shall take effect as if made to depend on the beneficiary or member of the class attaining the age of twenty-one years, and that age shall be substituted for the age stated in the instrument.

As in the case of realty, the periods during which income of personalty may be accumulated were limited by the Thellusson Act, 1800, and the Accumulations Act, 1892. These Acts have now been repealed and re-enacted in substance by the Law of Property Act, 1925 (*n*).

Equitable ownership.

The beneficial interest in chattels, in the same way as in the case of land, may be distinct from the legal ownership. The legal owner may be a trustee and bound to deal with the chattels for the benefit of another person, called the *cestui que trust*.

The Statute of Uses (*o*) did not affect trusts of chattels.

In general, the same rules apply to trusts of personalty as in the case of realty, but the *creation* of a trust of chattels personal is not required to be proved by writing, the provisions of the Law of Property Act, 1925 (*p*), which supersede s. 7 of the Statute of Frauds, referring only to trusts respecting land or any interest therein. The same Act, repealing and re-enacting in substance ss. 8 and 9 of the Statute of Frauds, provides that any disposition of a subsisting equitable interest or trust must be in writing (*q*), but these provisions are not to affect the creation or operation of resulting, implied or constructive trusts (*r*).

(*m*) S. 163. (*n*) Ss. 164-166. (*o*) 27 Hen. 8, c. 10.

(*p*) S. 53 (1) (b). (*q*) *Ib.* (1) (c).

(*r*) *Ib.* (2). For explanation of these terms, see Snell on Equity (ed. 20), Chs. 8 and 9.

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The equitable interest of the *cestui que trust* is, in most respects, governed by rules analogous to those affecting the legal ownership of the chattels, on the maxim that "Equity follows the law" (*s*). But if the trustee should dispose of the legal ownership of the chattels to a *bona fide* purchaser for value, without notice of the trust, the *cestui que trust* would have no remedy against such purchaser, but merely an action for damages for breach of trust against the trustee. If the transfer be with notice of the trust or not for valuable consideration, the person taking the chattels would be bound by the trust.

Ownership, joint, in common, or several.

Personal property may be owned by several jointly, or in common, or it may be owned by one in severalty, in the same manner as real property (*t*). Blackstone says (*u*) :—

> "If a horse, or other personal chattel, be given to two or more, absolutely, they are joint-tenants hereof; and, unless the jointure be severed, the same doctrine of survivorship shall take place as in estates of lands and tenements. And, in like manner, if the jointure be severed, as by either of them selling his share, the vendee and the remaining part-owner shall be tenants in common, without any *jus accrescendi* or survivorship. So also, if £100 be given by will to two or more, *equally to be divided between them*, this makes them tenants in common; as the same words would have done in regard to real estates."

Partnership.

The maxim *jus accrescendi inter mercatores locum non habet* expresses the rule of law that there is no right of survivorship in chattels belonging to partners (*x*). In truth, the share of each partner is not a share in any specific asset or any specific part of the assets, but is his share of what will ultimately come to him when the accounts are ascertained, and when the partners who are to contribute have contributed, and the assets are got in, the debts paid, and the property realised (*y*).

(*s*) See Snell on Equity (ed. 20), Ch. 3.

(*t*) See *Nyberg* v. *Handelaar*, [1892] 2 Q. B. 202. As to severance, see *Re Wilks*, [1891] 3 Ch. 59.

(*u*) 2 Bl. 399.

(*x*) Co. Litt. 182*a*.

(*y*) Per James, L.J., in *Ashworth* v. *Munn* (1880), 15 Ch. D. 370; and see *Helmore* v. *Smith* (1887), 35 Ch. D. 436.

Co-ownership, in which we include joint ownership and ownership in common, must be carefully distinguished from partnership. It is not easy to give a true definition of partnership. Perhaps the best description that can be given is that partnership is the relation subsisting between persons who have agreed to combine their property, labour, or skill in some business, and to share the profits and losses thereof between them (z). The definition in the Partnership Act, 1890, is as follows :—" Partnership is the relation which subsists between persons carrying on a business in common with a view of profit." The mere sharing of gross profits, with or without a common interest in the property whence the profits come, does not create a partnership (*a*). Thus, an agent paid by his commission on the receipts is not a partner with his employer. It used to be considered that an agreement to share net profits, without more constituted a partnership; but it is now decided that the question whether a partnership exists depends on the intention of the parties as shown by the whole facts of the case (*b*).

Partnership distinguished from co-ownership.

The principal differences between co-ownership and partnership may be stated as follows (*c*) :—

1. Co-ownership is not necessarily the result of agreement. Partnership is.

2. Co-ownership does not necessarily involve community of profit or of loss. Partnership does.

3. One co-owner can, without the consent of the others, transfer his interest to a stranger, so as to put him in the same position as regards the other owners as the transferor himself was before the transfer. A partner cannot do this.

4. One co-owner is not, as such, the agent, real or implied, of the others. A partner (except in the case of a limited partner in a partnership registered under the Limited Partnerships Act, 1907) is.

(*z*) Lindley on Partnership (8th ed.), 10; Pollock on Partnership (ed. 11), 3.

(*a*) 53 & 54 Vict. c. 39, s. 2 (2).

(*b*) *Pooley* v. *Driver* (1876), 5 Ch. D. 458; *Ex p. Delhasse* (1878), 7 Ch. D. 511; *Badeley* v. *Consolidated Bank* (1888), 38 Ch. D. 238; Partnership Act, 1890, s. 2 (3); *Davis* v. *Davis*, [1894] 1 Ch. 393; *Re Young*, [1896] 2 Q. B. 484.

(*c*) Lindley on Partnership (ed. 8), 26.

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5. One co-owner has no lien on the thing owned in common for outlays or expenses, nor for what may be due from the others as their share of a common debt. A partner has.

6. Co-owners of chattels, if interested in a moiety or upwards, may obtain an order for division from the Court on showing that such a course is desirable in the circumstances (*d*). A partner has no right to partition in specie, but is entitled, on a dissolution, to have the partnership property, whether land or not, sold, and the proceeds divided.

7. Co-ownership not necessarily existing for the sake of gain, and partnership existing for no other purpose, the remedies, by way of account and otherwise, which one co-owner has against the others, are in many important respects different from, and less extensive than, those which one partner has against his co-partners.

Joint chose in action.

When a chose in action is in joint names, for instance, stock in the public funds in the names of two trustees, the legal right is in the survivor alone, though he may be responsible to others in equity.

§ 2. *Possession.*

Possession.

The word "possession" is ambiguous. Its popular meaning does not exactly coincide with either of its legal meanings, and it has more than one legal meaning. "In common speech," says Sir F. Pollock, "a man is said to possess, or be in possession of, any thing of which he has the apparent control, or from the use of which he has the apparent power of excluding others" (*e*). For instance, a thief is in possession of a coat she has carried off, though the true owner is entitled to the possession of it. A. lends a book to B.; here B. is lawfully in possession, but he is bound to give up possession to A. when A. demands it. In each of these cases there is the danger of confounding the rights of the person who is in fact in possession with the rights of the person who has a right to possession, either absolute, or subject only to the performance of a condition, *i.e.* (in the case that we have last mentioned), that of demanding possession.

(*d*) Law of Property Act, 1925, s. 188.
(*e*) Pollock and Wright on Possession, 1.

"Possession," in its legal meaning, is used for—

(1.) *De facto* possession;
(2.) Possession in law.

Possession *de facto.*

"*De facto*" (or "actual") possession means effective occupation or control, manifested by some outward act. What amounts to *de facto* possession depends upon the nature and position of the thing possessed, and the intention with which the act was done. The acts by which I manifest the possession of the coat that I am wearing are of a very different nature from those by which I manifest my possession of a seat in my garden. *Prima facie*, the act of wearing the coat is a strong manifestation of my possession; but, if I went to a vendor of ready-made clothes and tried on a coat to see whether it fitted me, the circumstances would show that the act of wearing the coat was not intended to manifest my possession of it. It is not my intention to exclude the tradesman from retaining control of the garment.

The possession of a house or land carries with it, in general, possession of everything attached to or in or upon or under that land or house, and, in the absence of a better title in another, the right to possess it (*f*).

A common case, in which the circumstances show that an outward act is not intended to amount to a claim to possession, is where the person apparently having *de facto* possession holds, and admits that he holds, that possession for some other person, as where a servant holds it for his master (*g*), or where a bailiff holds property taken under a distress (*h*). In a case of this nature the word "custody" is sometimes used instead of "possession." We speak of a servant having

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(*f*) *Elwes* v. *Brigg Gas Co.* (1886), 33 Ch. D. 562; *S. Stafford*
Co. v. *Sharman*, [1896] 2 Q. B. 44; *Lord's Trustee* v. *G. E. R.*
Co., [1908] 2 K. B. 54; [1909] A. C. 109. Cf. *Bridges* v. *Hawkes-*
worth (1851), 21 L. J. Q. B. 75; *Johnson* v. *Pickering*, [1907]
2 K. B. 437; [1908] 1 K. B. 1. See also Cambridge Law Journal,
Vol. III, p. 195, "Three Cases on Possession," by A. L. Goodhart.

(*g*) Per Hardwicke, C., *Ward* v. *Turner* (1751), 2 Ves. sen. 438.

(*h*) As to the difference between goods taken in execution and under a distress, see Pollock and Wright, 82.

"custody" of the things placed in his charge by his master, and of goods seized under the distress as being in the "custody" of the law.

Possession in law.

A person has possession in law when—

(1.) He has the *de facto* possession and no other person has or can without his consent acquire the right to the possession. This includes the common case of the owner being in possession.

(2.) He has the *de facto* possession, and has the manifest intention of excluding every other person from the *de facto* possession, notwithstanding that another person has the right to the possession. This is the case where a thief is in possession of a thing that he has stolen. He manifestly intends to exclude every other person from possession; yet the owner has the right to the possession.

(3.) He has the *de facto* possession with the consent of the owner. This is the case of a bailee; where a man has hired or borrowed a chattel, where it is pledged to him, where he takes care of it or undertakes to carry it for the true owner.

(4.) He has had legal possession in any of the cases above mentioned and has lost the thing, or has ceased to exercise any effective control, and no other person has acquired *de facto* possession. This is the case, for example, where a man has lost a ring in his house, or where the owner of a quarry ceases to work it, and leaves his tools in the quarry.

It should be observed that a person who has *de facto* possession has possession in law as against all the world except the person or persons, if any, who has or have a better right to the possession. Legal possession, *i.e.*, possession in law, is a root of title. Being in itself a substantive right in the nature of property, it may be transferred *inter vivos*, or may be disposed of by will, or may devolve on intestacy (*i*).

Right to possess.

The "right to possess," or to have legal possession, is one of the rights exercisable by the owner of the thing, unless he has parted with it. It is often confounded with ownership itself and still more often with possession.

The right may co-exist with *de facto* possession, as where the owner has *de facto* possession, or it may be separated from the *de facto* possession.

Where *de facto* possession is undetermined, possession in law follows the right to possess (*k*). For instance, furniture which is in a house occupied by two persons (*l*), *e.g.*, husband and wife, is in the possession of the one who has the legal title to the furniture (*m*).

Owner out of possession.

We have to consider the cases where the owner has not the *de facto* possession. There are two classes of cases :—

First. Where he has the right to possess.

Secondly. Where he has not the right to possess. In this case he may be able, or he may not be able, to acquire the right to possess on demanding possession from the possessor. In cases of this nature the owner is called the bailor and the possessor is called the bailee.

Goods lost or stolen.

Cases of the first class occur where the goods are lost, or taken by a wrongdoer. The finder or person who takes them has the right to possess against everybody except a person who has acquired a prior right to possession; but the true owner retains his right to possess against everybody, including the *de facto* possessor (*n*).

For example, if Armory finds a ring which has been

(*i*) Pollock and Wright, 23; *Asher* v. *Whitlock* (1865), L. R. 1 Q. B. 1. See *Daniel* v. *Rogers*, [1918] 2 K. B. 228.

(*k*) Pollock and Wright, 24.

(*l*) *Cookson* v. *Swire* (1884), 9 App. Cas. 653; *Antoniadi* v. *Smith*, [1901] 2 K. B. 589.

(*m*) *Ramsay* v. *Margrett*, [1894] 2 Q. B. 18; *French* v. *Gething*, [1922] 1 K. B. 236; see *Re Magnus*, [1910] 2 K. B. 1049.

(*n*) *Armory* v. *Delamirie* (1722), 1 Sm. L. C. (ed. 13), 393.

lost by X., the true owner, and delivers it to Delamirie, a jeweller, to be valued, Delamirie will be liable to an action of trover if he refuses to return it to Armory, who has a prior right to possession; but neither would be able to retain the ring against a claim by X., if X. discovered the whereabouts of his lost ring (*n*).

Bailments.

In cases of the second class, or bailments, both the *de facto* possession and the right to possess are in the bailee. Bailment has been defined as a delivery of goods on a condition, express or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose for which they were bailed shall be answered. The bailor has a right to the re-delivery or disposal according to his directions of the very thing bailed, so that, where the contract is that another thing, even if it be of the same quality and value, is to be given to the person who delivered the property, the contract is not one of bailment (*o*).

Change of possession.

The transfer of the possession of goods may be voluntary, in which case it is effected by a process which is called "delivery" by the transferor, and "acceptance and receipt" (*p*) by the transferee; or it may be involuntary, in which case the process is called dispossession or "ouster" of the person deprived of possession, and "occupation" or "taking" by the person who acquires possession, as where a chattel is lost or stolen.

"Delivery."

Delivery of a movable object is effected by handing it to the transferee with the intent to transfer the possession. But the thing may be handed over with the intention to confer an authority to use it in a specified manner only; as where a host hands a chair to a guest; in this case the act of the possessor does not amount to transfer of possession.

Bulky objects.

Bulky objects or masses of goods cannot readily be handed over; but the possession of them is transferred

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(*n*) *Armory* v. *Delamirie*, *supra*.

(*o*) *South Australian Insurance Co.* v. *Randell* (1869), L. R. 3 P. C. 101.

(*p*) See *post*, p. 66.

by any act which puts them under the effective control of the person to whom possession is to be given (*q*).

The delivery of the key of a box or warehouse in which the goods are stored is an ambiguous act. It may be intended to enable the person to whom the key is given to deal with the goods in a specified manner, as where the key is given to a servant to enable him to take out something for his master's use. In this case there is no transfer of possession. But where the delivery of the key confers an effective control for all purposes on the person to whom it is handed, it operates as a transfer of the possession of the goods (*r*). If the key is given to a person who has the right to possess the goods, it operates as a transfer of the possession.

"Symbolic delivery."

In cases of this nature the delivery of the key is sometimes called "symbolic," or "constructive," delivery (*s*). But it is more than this; for, if the person to whom the key is delivered retains it and if it is the only key, or the only key intended to be used, the effect of the delivery of the key is to give to the person to whom it is given the exclusive control, or *de facto* possession, of the goods; if he chooses to lock the door, no other person can rightfully deal with them without his permission. On the other hand, if it be given to him as the servant of the owner for some temporary purpose, he has no right to exclude the owner; or, if it be given to him for his own use, and another key be retained by the owner with the intention of obtaining access to the goods, the person to whom the key is delivered does not acquire the exclusive control or *de facto* possession of the goods. Therefore, the question whether the delivery of the key operates as transfer of the possession of the goods depends upon the circumstances of the case.

(*q*) *Kilpin* v. *Ratley*, [1892] 1 Q. B. 582. See *Ramsay* v. *Margrett*, [1894] 2 Q. B. 18; *Rawlinson* v. *Mort* (1905), 93 L. T. 555; *Re Magnus*, [1910] 2 K. B. 1049. Cf. *Valier* v. *Wright and Bull* (1917), 33 T. L. R. 366.

(*r*) *Wrightson* v. *McArthur and Hutchinson*, [1921] 2 K. B. 807.

(*s*) Per Willes, J., *Meyerstein* v. *Barber* (1866), L. R. 2 C. P. 52; and per Mellish, L.J., *Ancona* v. *Rogers* (1876), 1 Ex. D. 285.

Lord Hardwicke says, "Delivery of the key of bulky goods has been allowed as delivery of the possession, because it is a way of coming at the possession or to make use of the thing and therefore the key is not a symbol, which would not do" (*t*).

Sir F. Pollock, commenting on these cases, says (*u*) :—

> "On the whole, we have indeed the authority of Willes, J., and Mellish, L.J., for speaking of delivery by a warehouse-key or the like as a symbolic delivery; but there is no real contradiction between this and what Lord Hardwicke said, 'the key is not a symbol, which would not do.' The key is not a symbol in the sense of representing the goods, but the delivery of the key gives the transferee a power over the goods which he had not before, and at the same time is an emphatic declaration (which being by manual act, instead of word, may be called symbolic) that the transferor intends no longer to meddle with the goods. It therefore excludes doubt as to the intent and effect of other acts which standing alone might be ambiguous."

Confusion between "possession" and "right to possess."

In many of the reported cases and text-books there is some confusion of language against which the student must be on his guard.

First. A person who has an immediate right to possess is often said to have possession. Possibly the reason for this is that the same action, viz., trespass, could formerly be brought against a person who interfered either with the possession or with the immediate right to possess.

"Qualified ownership."

Secondly. A bailee (who, it will be remembered, has both the possession and the right to possess) is sometimes said to have a "qualified ownership," or "special property," in the goods bailed, while the bailor is said to retain the "general" ownership or "general property" (*v*).

The explanation appears to be that, as against the bailor, the bailee can exercise all those rights which are annexed by law to the possession, except so far as he

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(*t*) *Ward* v. *Turner* (1751), 2 Ves. sen. 443; 1 W. & T. L. C. (ed. 9), 350; *Hilton* v. *Tucker* (1888), 39 Ch. D. 669; *Gough* v *Everard* (1863), 2 H. & C. 1.

(*u*) Pollock and Wright, 68.

(*v*) Co. Litt. 145*b*; Plowd. 542.

may have been precluded from exercising them by the nature of the bailment or by express contract; he may also exercise other rights depending on the nature of the bailment. As against all persons, other than the bailor or having a title superior to that of the bailor, he has all the remedies of the owner (*x*).

Rights *in personam.*

Where one man has a right against another defined person, as distinguished from the case in which he has rights against all the world, his right is said to be a right *in personam*. An example is a debt. But as the person entitled to this right can deal with it in an indefinite number of modes as regards third persons, he is said to be owner of or to have property in the debt. For example, though the sole right of a creditor as against his debtor is to be paid, *i.e.*, a right *in personam*, he can, as against all the world, sell, mortgage, or release the debt; and these rights are considered to be rights *in rem*, although the *res* has no physical existence.

Although possession in the strict sense only exists in respect of corporeal things, nevertheless, for certain purposes, rights analogous to those arising from possession are recognised in respect of incorporeal things, such as *choses in action*. For instance, "debts due or growing due to a bankrupt in the course of his trade or business" are within the "possession, order and disposition" clause of the Bankruptcy Act, 1914 (*y*).

Actions of Trespass, Trover, Detinue.

In order to understand the reported cases on possession and the right to possess, it is absolutely necessary that the student should have some knowledge of the forms of action which were in use before the Judicature Acts came into operation.

Trespass.

Trespass was an action that could be brought only by a person having actual possession, or, if he had not actual possession, having an immediate right to possess (*z*); but, as against a mere wrongdoer, it was

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(*x*) *Armory* v. *Delamirie* (1722), 1 Sm. L. C. 393; *The Winkfield*, [1902] P. 42; cf. *Eastern Construction Co.* v. *National Trust Co.*, [1914] A. C. 197.

(*y*) S. 38 (c). *Infra*, Ch. XVII.

(*z*) "A lessor at will or a bailor, where the bailment is not for a term or coupled with an interest, could always maintain trespass immaterial whether the actual possessor had the right to possess (*a*). The action could be brought in respect of either land or goods. All that the plaintiff had to prove was that he was in actual possession, or that he had an immediate right to possess, at the time when the wrongful act was done; and, if the plaintiff was in actual possession, the defendant could not successfully defend himself by showing that a third person had the right to possess, unless that person intervened (*b*).

Jus tertii.

Trover.
Ejectment.

Where the injury done by the wrongdoer was an infringement of the right to possess, the actions were ejectment for land, trover for goods (*c*). As actual possession confers a right to possess against a mere wrongdoer; it followed that where a person was in actual possession and his possession was disturbed by the act complained of, so that he might have brought trespass, he might, instead of so doing, bring an action of ejectment or trover, as the case required. The action of trover was in form an action "on the case" for damage to the plaintiff, who alleged that the defendant had *found* the goods and converted them to his own use, the finding being by a fiction deemed to give lawful possession. Hence the action was called "trover and conversion," and the gist of it was the "conversion" of the goods, *i.e.*, depriving the plaintiff of the use and possession of the goods (*d*). Where the wrong was done to the actual possession, the defendant could not defend himself by showing that the right to possess

Conversion.

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against a wrongdoer as well as the lessee or bailee": Pollock and Wright, 93. A trustee can bring trespass though goods are in the possession of *cestui que trust*: *White* v. *Morris* (1852), 11 C. B. 1015.

(*a*) *Harper* v. *Charlesworth* (1825), 4 B. & C. 574; 28 R. R. 405.

(*b*) *Graham* v. *Peat* (1801), 1 East, 244; 6 R. R. 268; per Ld. Cairns, C., *Bristow* v. *Cormican* (1878), 3 App. Cas. 651.

(*c*) *Hollins* v. *Fowler* (1875), L. R. 7 H. L. 757; *Jelks* v. *Hayward*, [1905] 2 K. B. 460.

(*d*) See *Gordon* v. *Harper* (1796), 7 T. R. 9; 4 R. R. 369; *Consolidated Co.* v. *Curtis*, [1892] 1 Q. B. 495; see as to this action, 3 Bl. 152; Pollock on Torts, Ch. IX., s. 5; Ames, "History of Trover," Anglo-American Legal Essays, Vol. III., p. 417; Salmond, Law of Torts (ed. 7), pp. 375 *et seq*; and notes to *Wilbraham* v. *Snow* (1678), 2 Wms. Saund. 47.

Jus tertii.

was in a third person (*e*); but where the claim was for an infringement of an alleged right to possess, such a defence was effectual (*f*).

> *Examples.* A. is in possession of a house; B. comes and takes possession. This is a wrong done to the actual possession, and therefore A. could bring either trespass or ejectment against B., and B. could not defend himself by showing that the house belonged to C. (*g*).
>
> A. is in possession of a house. B., alleging that he has the right to possess it, so that the possession of A. is an injury to his alleged right to possess, brings ejectment against A. A. can successfully defend himself by showing that the house belongs to C.
>
> A. is in possession of goods. B. takes them out of his possession; A. brings trover; B. proves that the goods belong to C.; this is no defence (*e*).
>
> A. bought goods from B. and allowed him to remain in possession. B. became bankrupt. As the goods were in his possession with the consent of the true owner, the ownership and the right to possess passed to his assignees in bankruptcy. The sheriff seized under a *fi. fa.* A. brought trover against the sheriff, and it was held that the sheriff might defend himself by setting up the right of the assignees who claimed the goods (*h*).

Detinue.

Detinue was an action by a person who had the right to immediate possession (*i*) against a person who had lawfully come into possession of goods for unlawfully detaining them. But the plaintiff was not bound to show the circumstances under which the goods came into the defendant's possession (*k*). The judgment was

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(*e*) *Armory* v. *Delamirie* (1722), 1 Sm. L. C. 393; *Jeffries* v. *G. W. R. Co.* (1856), 5 E. & B. 802.

(*f*) *Leake* v. *Loveday* (1842), 4 M. & Gr. 972.

(*g*) *Davison* v. *Gent* (1857), 1 H. & N. 744.

(*h*) *Leake* v. *Loveday*, *sup.*

(*i*) *Nyberg* v. *Handelaar*, [1892] 2 Q. B. 202.

(*k*) *Gledstane* v. *Hewitt* (1830), 1 Cr. & J. 565.

originally that the plaintiff should recover the goods or their value. The Court may now order the defendant to deliver up the goods without the option of keeping them and paying their value. And a writ of delivery may be issued under which the sheriff will distrain the defendant by all his lands and chattels until he delivers the property, or a writ of assistance may be issued under which the sheriff will put the plaintiff in possession of the property (*l*).

A. hires furniture from B. and obtains possession of it. At the end of the term for which it is hired, A. declines to give the furniture back to B. In this case A. came lawfully into possession of the furniture; the injury done to B. is the detention, and the action of detinue was the appropriate form of action to enable B. to recover possession of the furniture.

One fundamental difference between real estate and chattels real on the one hand, and personal chattels on the other, appears distinctly from the consideration of these actions. A person entitled to possess property of the former class could by bringing an action of ejectment, obtaining judgment, and suing out execution on that judgment, obtain actual possession of the land. On the other hand, if the action was that of detinue, the only action at common law to recover possession of a specific chattel, and the defendant declined to give it up, the plaintiff could only obtain judgment for damages representing the value of the thing unlawfully detained (*m*).

(*l*) R. S. C. Ord. XLVIII; *Wyman* v. *Knight* (1888), 39 Ch. D. 165. See *Peruvian Co.* v. *Dreyfus*, [1892] A. C. 176; *Ex p. Drake* (1877), 5 Ch. D. 866.

(*m*) The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125, s. 78), enabled the Court to order specific delivery, without giving the defendant the option of retaining the goods on paying damages. See now R. S. C., Ord. XLVIII.

CHAPTER II.

BAILMENTS—POSSESSORY LIEN.

§ 1. *Bailments.*

Chap. II.

Definition of bailment.

A BAILMENT has been defined to be (*a*) "a delivery of goods on a condition, expressed or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose for which they are bailed shall be answered." In this definition the "bailor" is the person who delivers the goods to the "bailee."

A bailment must be distinguished from an alienation of the property with a proviso for repurchase, and from an alienation of the property upon trust. In both these cases, the ownership passes and not merely possession.

Classes of bailments.

Holt, C.J., in his celebrated judgment in *Coggs* v. *Bernard* (*b*), divided bailments into six classes, viz., (1) *Depositum*, which is "a bare naked bailment of goods delivered by one man to another to keep for the use of the bailor," without reward; (2) *Commodatum*, "when goods or chattels that are useful are lent to a friend *gratis*, to be used by him"; (3) *Locatio rei*, "when goods are lent to the bailee to be used by him for hire"; (4) *Vadium*, *Pawn* or *Pledge*, "when goods or chattels are delivered to another to be a security to him for money borrowed of him by the bailor"; (5) *Locatio operis faciendi*, "when goods or chattels are delivered to be carried, or something is to be done about them, for a reward"; and (6) *Mandatum*, "when there is a delivery of goods or chattels to somebody who is to carry them, or do something about them, *gratis*, without any reward for such his work or carriage."

(*a*) Jones on Bailments, p. 1; Story on Bailments, p. 2.
(*b*) (1703), 2 Ld. Raym. 909; 1 Sm. L. C. (ed. 13), 175, 196.

Again, bailments may be classified according as they are for the benefit of (α) the bailor only, as in the case of a deposit without reward; or (β) for the benefit of the bailee only, as in the case of goods lent gratuitously; or (γ) for the benefit of both bailor and bailee, as in the case of the hiring of a thing for use, or of a delivery of goods to a bailee who, for a reward, is to carry them, or otherwise bestow care or labour upon them. This class includes bailments to pawnbrokers, innkeepers, and carriers.

Bailee has exclusive control.

The delivery must be made for the purpose of giving the exclusive control of the goods (*c*). In ordinary cases a man does not create a bailment by putting the goods in the charge or custody of his servant, nor by delivering them to a person to be used in his presence or in his house (*d*), though the mere fact that they are not to be carried away from the house does not prevent the transaction from being a bailment.

Delivery.

The delivery need not be made by the bailor himself. Thus, A. may sell goods to B. and, with B.'s consent, deliver them to a warehouseman to hold as a bailee for B.

By change of character of possession.

A bailment may arise from a mere change in the character of the possession, without any change in the possession itself. Thus, A., being in possession of the goods, either as owner or as bailee for B., may (in the latter case with B.'s consent) agree with C. to hold them as his bailee. This is called "bailment by attornment" (*e*).

Taking with consent of owner.

"Upon the whole, it is conceived that in general any person is to be considered as a bailee who, otherwise than as a servant, either receives possession of a thing for another or consents to receive or hold possession of a thing for another, upon an undertaking with

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(*c*) See *Ultzen* v. *Nicols*, [1894] 1 Q. B. 92.

(*d*) Pollock and Wright on Possession, 138, 160: 3 Inst. 108.

(*e*) *Elmore* v. *Stone* (1809), 1 Taunt. 458; 10 R. R. 578; *Mills* v. *Charlesworth* (1890), 25 Q. B. D. 421, 425; *Dublin City Distillery, Lim.* v. *Doherty*, [1914] A. C. 823. See also Sale of Goods Act, 1893, s. 45 (3).

the other person either to keep and return or deliver to him the specific thing or to apply the specific thing according to the directions antecedent or future of the other person" (*f*).

"Qualified" ownership or "special property."

The bailee has always possession of the goods and the right to possess, though his right to possess may be determinable at any time at the will of the bailor, or otherwise in accordance with the terms of the bailment. The bailee may lawfully exercise over the goods all the rights which are annexed by law to the possession, except so far as he may be precluded from exercising them by the nature of the bailment or by express contract. He has an insurable interest (*g*), and he may sue for injury to or interference with the goods, and recover from a person who injures the goods the amount of such injury as damages (*h*). The bailee is said to have a "special property," or "qualified ownership," in the goods, while the bailor is said to have the "general property" or "general ownership" (*i*).

Bailment not dependent on contract.

There may be a complete bailment although there is no valid contract, as where the bailee is an infant (*k*); or, in cases not falling within the Married Women's Property Act, 1882, where the bailee is a married woman (*l*), the essence of the transaction being delivery subject to a condition (*k*).

Identical goods.

Unless the identical goods, either in the original or an altered form, are to be applied or returned, the transaction is not a bailment (*m*); as, for instance, where coin is paid to a man and he is not to apply or return it in specie (*n*). On the other hand, if the identical coins are to be applied or paid, as where they

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(*f*) Pollock and Wright on Possession, 163.

(*g*) *Waters* v. *Monarch, &c. Co.* (1855), 5 E. & B. 870.

(*h*) *The Winkfield*, [1902] P. 42; *The Zelo*, [1922] P. 9.

(*i*) Co. Litt. 145*b*; Plowd. 524.

(*k*) *The Queen* v. *McDonald* (1885), 15 Q. B. D. 323.

(*l*) *R.* v. *Robson* (1861), 9 Cox, 29.

(*m*) *South Australian, &c. Co.* v. *Randell* (1869), L. R. 3 P. C. 101.

(*n*) *Pott* v. *Clegg* (1847), 16 M. & W. 321; *Tassell* v. *Cooper* (1850), 9 C. B. 509; *R.* v. *Hassall* (1861), 30 L. J. M. C. 175.

are special foreign coins or are enclosed in a bag or letter, the transaction is a bailment (*o*).

Bailee may not have to restore goods—auctioneer—pledgee.

But a bailment may exist although it may be the duty or right of the bailee to sell the goods, as in the case of an auctioneer (*p*) or pledgee, in either of which cases, if a sale is made it is impossible for the bailee to restore the goods to the bailor. It may even exist where, on the happening of certain events, the property in the goods will be transferred to the bailee, so that he will not have to restore them to the bailor. Thus, where an abstract of the title to land is delivered to a person who has contracted to purchase the land, if the purchase goes off, he must restore the abstract to the vendor; if the purchase is completed, he has the right to retain it (*q*). So, in the case of goods let under a hire-purchase agreement under which, if default is made in payment of rent or instalments, the original owner has the right to require the hirer to return the goods hired, but, if no default is made, they become, at the expiration of the stipulated term or on payment of the stipulated amount of hire, the absolute property of the hirer (*r*).

Re-delivery to bailor for special purpose.

The bailee may re-deliver the goods to the bailor for a special purpose without determining the bailment (*s*).

Return of goods without re-delivery.

The bailee may do that which amounts to returning the goods to the bailor, without making an actual re-delivery to the bailor, by delivering the goods, with the consent of the bailor, to a third person who consents to hold them as the bailee of the original bailor. This is called bailment by "attornment" (*t*).

(*o*) See the cases collected, Pollock and Wright on Possession, 161.

(*p*) See *Barker* v. *Furlong*, [1891] 2 Ch. 172; *Consolidated Co.* v. *Curtis*, [1892] 1 Q. B. 495.

(*q*) *Roberts* v. *Wyatt* (1810), 2 Taunt. 268; 11 R. R. 566.

(*r*) See *Helby* v. *Matthews*, [1895] A. C. 471; *Brooks* v. *Beirnstein*, [1909] 1 K. B. 98.

(*s*) *Reeves* v. *Capper* (1838), 5 Bing. N. C. 136. See also *Roberts* v. *Wyatt*, *sup.*; *North Western Bank* v. *Poynter*, [1895] A. C. 56. Cf. *Albemarle Supply Co.* v. *Hind & Co.*, [1928] 1 K. B. 307.

(*t*) *Godts* v. *Rose* (1855), 17 C. B. 229.

Several bailors.

Where there are several bailors, the bailee is not bound to re-deliver the goods to some or one only of them, without the consent of the others (*u*).

Determination of bailment by act of bailee.

"The act of the bailee in doing a thing entirely inconsistent with the terms of the bailment, though not amounting to a destruction of the chattel, is a determination of the bailment, and causes the possessory title (*i.e.*, the right to possess) to revert to the bailor" (*x*). This rule has been applied where a bailee for hire sold the goods (*y*); where a mortgagor of goods sold them (*z*); where a man to whom oxen were lent to plough land killed them (*a*); and where a warehouseman (*b*) or carrier (*c*) delivered the goods to a wrong person; but if a *pledgee* deals with the pledge in a manner other than is allowed by law for the payment of his debt, the immediate right to possession does not re-vest in the pledgor. He must first pay or tender what remains due on the pledge (*d*).

Bailee may not dispute title of bailor.

Jus tertii.

As a general rule, the bailee is not allowed to dispute the title of his bailor. He is bound to restore the goods on the performance of the condition on which the bailment is made, notwithstanding that he knows that a third person has or claims to have a better title to the goods than the bailor (*e*); and if a third person claims the goods and proceeds against him, it is his duty to inform the bailor of the proceedings (*f*). On the other hand, although the bailee cannot set up a title to the goods on his own behalf against his bailor,

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(*u*) *Harper* v. *Godsell*, L. R. 5 Q. B. 422.

(*x*) Per Parke, B., *Fenn* v. *Bittleston* (1851), 7 Ex. 159; see also *Donald* v. *Suckling* (1866), L. R. 1 Q. B. 585, 614.

(*y*) *Cooper* v. *Willomatt* (1845), 1 C. B. 672.

(*z*) *Fenn* v. *Bittleston*, *sup.*

(*a*) Litt. s. 71.

(*b*) *Devereux* v. *Barclay* (1819), 2 B. & Ald. 702; 21 R. R. 457.

(*c*) *Youl* v. *Harbottle* (1791), Peake, 49; *Stephenson* v. *Harte* (1828), 4 Bing. 476; 29 R. R. 602.

(*d*) *Halliday* v. *Holgate* (1868), L. R. 3 Ex. 299; *Yungmann* v. *Briesemann* (1892), 67 L. T. 642.

(*e*) *Biddle* v. *Bond* (1865), 6 B. & S. 225; *Rogers* v. *Lambert*, [1891] 1 Q. B. 318.

(*f*) *Ranson* v. *Platt*, [1911] 2 K. B. 291.

he can successfully resist the claim of the bailor to have the goods delivered to him, by showing that in refusing to give them up he is acting at the request and with the authority of a person who has a better title than the bailor (*g*); or by showing that such a person has actually taken the goods from him contrary to his wish (*h*); but he cannot set up the title of another if he accepted the goods with knowledge of the adverse claim (*i*); and if the bailee has *attorned* to an innocent purchaser of the goods, he is estopped from denying the title of the purchaser (*k*).

The bailee may become liable to the true owner if he refuses to give up the goods to him, but it must be a definite refusal, and merely failing to give up goods on demand, pending the making of reasonable inquiries, will not expose the bailee to an action for wrongful detention (*l*).

In the case of conflicting claims by the bailor and a third person the bailee may institute interpleader proceedings (*m*).

Duty of bailee in cases where the bailment is—

The bailee is bound to take care of the goods bailed, and is responsible if they are lost or damaged through his negligence. The degree of negligence which renders him responsible depends upon the nature of the bailment.

for benefit of bailor only;

First: Where the bailment is entirely for the benefit of the bailor, as where goods are delivered to the bailee to be kept by him gratuitously (the *depositum* of the Roman law), or to be carried or worked on by him gratuitously (the *mandatum* of the Roman law), he is, in the absence of special contract, only liable for what is commonly termed gross negligence (*n*).

(*g*) *Thorne* v. *Tilbury* (1858), 3 H. & N. 534; *Rogers* v. *Lambert*, *sup.*

(*h*) *Shelbury* v. *Scotsford* (1602), Yelv. 23; *Ross* v. *Edwards* (1895), 73 L. T. 100.

(*i*) *Ex p. Davies* (1881), 19 Ch. D. 86.

(*k*) *Henderson* v. *Williams*, [1895] 1 Q. B. 531.

(*l*) *Le Roy* v. *Clayton*, [1911] 2 K. B. 1046.

(*m*) *Rogers* v. *Lambert*, [1891] 1 Q. B. 318, 327; R. S. C. Ord. LVII.

(*n*) *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909; 1 Sm. L. C. 175;

The question what amounts to gross negligence in any particular case is a question of fact. Generally speaking, the fact that the gratuitous bailee has taken the same amount of care of goods deposited with him that he takes of his own property affords a strong, though not a conclusive, presumption that he has not been guilty of gross negligence (*o*).

A person who gratuitously undertakes the carriage of another person, or of goods, is bound to exercise reasonable care according to the circumstances of the case (*p*).

Where the gratuitous bailee undertakes to carry, or to do something to the goods bailed, he is bound to use such skill as he has in fact, and is guilty of gross negligence if he does not (*q*). In this case, if he undertakes to do that something to the best of his skill, and his situation or profession is such as to imply skill, an omission to use that skill is gross negligence (*r*).

for benefit of bailee only;

Secondly: Where the bailment is solely for the benefit of the bailee, as in the case of a gratuitous loan of chattels to be used by the bailee (the *commodatum* of the civilians). In this case the bailee is bound to use great diligence in the protection of the chattels, and will be liable even for slight negligence.

Slight negligence is the omission of that amount of care that very attentive and vigilant persons take of their own goods (*s*). The bailee must be considered as having held himself out to the lender as being competent to take care of the thing lent (*t*). A borrower is only allowed to use the thing lent in accordance with

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Doorman v. *Jenkins* (1834), 2 A. & E. 258; 41 R. R. 429; *Shiells* v. *Blackburne* (1789), 1 H. Bl. 158; 2 R. R. 750; *Dartnall* v. *Howard* (1825), 4 B. & C. 345.

(*o*) *Giblin* v. *McMullen* (1868), L. R. 2 P. C. 339; *Doorman* v. *Jenkins*, *ubi sup.*; cf. *Newman* v. *Bourne and Hollingsworth* (1915), 31 T. L. R. 209.

(*p*) *Harris* v. *Perry*, [1903] 2 K. B. 219.

(*q*) *Wilson* v. *Brett* (1843), 11 M. & W. 113.

(*r*) *Shiells* v. *Blackburne*, *sup.*

(*s*) *Coggs* v. *Bernard*, *sup.*; Bracton, lib. 3, c. 2, s. 1.

(*t*) Per Parke, B., *Wilson* v. *Brett* (1843), 11 M. & W. 113.

the conditions of the loan (*u*). But if the goods have been injured or destroyed by a stranger without any negligence on the part of the bailee, he is not liable to the bailor (*x*).

for common benefit of bailee and bailor.

Thirdly: When the bailment is for the common benefit of both bailor and bailee, as in cases of pawn, hire, warehousing for hire, and in other cases where the bailee undertakes for reward to do work upon or to carry the goods. In all these cases, except where the goods are delivered to a common carrier, the bailee is bound (in the absence of special contract) to use ordinary care, and is liable for ordinary negligence. By "ordinary care" is meant that care which every prudent man takes of his own goods (*y*). The bailee will be liable if the goods are injured through the negligence of his servant while acting in the course of his employment, but not if his servant is acting for his own purposes outside the scope of his employment (*z*), as, for instance, if he steals the goods.

The tendency of modern decisions, however, is to disregard the traditional distinction between "gross," "ordinary," and "slight" negligence, and to take the objective test of the conduct of a reasonable man in the particular circumstances of the bailment in question. To quote Rolfe, B., gross negligence is negligence "with the addition of a vituperative epithet" (*a*).

The obligations arising from three particular cases of bailments, viz., pawn, and bailments to carriers and innkeepers, require special consideration.

A pledge or pawn (*pignus* of the civilians) is where

(*u*) *Bringloe* v. *Morrice* (1676), 1 Mod. 210.

(*x*) See *The Winkfield*, [1902] P. 42.

(*y*) *Coggs* v. *Bernard*, *sup.*; (hiring) *Dean* v. *Keate* (1811), 3 Camp. 4; 13 R. R. 735; (warehousing) *Brabant* v. *King*, [1895] A. C. 632; (livery stable keeper) *Searle* v. *Laverick* (1874), L. R. 9 Q. B. 122; (work for hire) *Clarke* v. *Earnshaw* (1818), Gow, 30; 21 R. R. 790; (agister) *Halestrap* v. *Gregory*, [1895] 1 Q. B. 561; *Turner* v. *Stallibrass*, [1898] 1 Q. B. 56.

(*z*) *Sanderson* v. *Collins*, [1904] 1 K. B. 628; *Coupé Co.* v. *Maddick*, [1891] 2 Q. B. 413; *Cheshire* v. *Bailey*, [1905] 1 K. B. 237.

(*a*) *Wilson* v. *Brett*, *ubi sup.* at p. 115.

Pawn or pledge.

possession of a personal chattel is delivered by one person, called the pawnor or pledgor, to another, called the pawnee or pledgee, as security for a debt. The pawnee, having both the possession and the right to possess, is said to have a "special property" in the chattel (*b*), the general property remaining in the pawnor. But, on tender or repayment, the right to possess is immediately re-vested in the pawnor (*c*).

It need hardly be said that the pawnee does not acquire any greater right to the chattel than that which the pawnor had (*d*). There are some exceptions to this rule contained in the Factors Act, 1889 (*e*), and the Sale of Goods Act, 1893 (*f*), in favour of pledges by factors (*e*), by persons who sell goods and remain in possession of them or of the documents of title thereto, and by persons who have bought or agreed to buy goods and have obtained possession thereof or of the documents of title thereto with the consent of the seller (*f*).

The pawnee has a right to sell the goods on non-payment of the debt when a day is fixed for payment (*g*), but only after notice if no day is fixed (*h*). He may repay himself out of the proceeds, but must pay to the pawnor the net surplus of the purchase-money after payment of all expenses.

The pawnee's interest in the pawn is alienable, and may be sub-pledged (*i*) and be seized in execution by the sheriff (*k*).

(*b*) See Campbell on Sale, 57; *Donald* v. *Suckling* (1866), L. R. 1 Q. B. 604; *Halliday* v. *Holgate* (1868), L. R. 3 Ex. 299; *Burdick* v. *Sewell* (1882), 10 Q. B. D. 363, 367; *Re Morritt* (1886), 18 *Id.* 222.

(*c*) *Re Lawford*, [1902] 2 K. B. 445.

(*d*) *Lamb* v. *Attenborough* (1862), 1 B. & S. 831.

(*e*) 52 & 53 Vict. c. 45, ss. 2-9. See *Weiner* v. *Harris*, [1910] 1 K. B. 285; *Tremoille* v. *Christie* (1893), 69 L. T. 338.

(*f*) 56 & 57 Vict. c. 71, s. 25. See *Helby* v. *Matthews*, [1895] A. C. 471; *Nicholson* v. *Harper*, [1895] 2 Ch. 415; *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.*, [1899] 1 Q. B. 643; *Whiteley* v. *Hilt*, [1918] 2 K. B. 808.

(*g*) *Capper* v. *Dickingson* (1616), 1 Rolle Rep. 181.

(*h*) *Ex p. Hubbard* (1886), 17 Q. B. D. 690, 698; *Re Morritt* (1886), 18 Q. B. D. 222.

(*i*) *Donald* v. *Suckling* (1866), L. R. 1 Q. B. 585.

(*k*) *Re Rollason* (1887), 34 Ch. D. 495.

A pawn or pledge is not within the Bills of Sale Acts (*l*), although accompanied by a contemporaneous document signed by the pawnor or pledgor recording the transaction and regulating the rights of the pawnee or pledgee as to the sale of the goods (*m*).

Pawnbrokers Act, 1872.

Many statutory provisions have been made with regard to pawnbrokers or persons who carry on the business of lending money on goods taken in pawn, beginning with 1 Jac. 1, c. 21; but these have all been superseded by the Pawnbrokers Act, 1872 (*n*), amended by the Pawnbrokers Act, 1922 (*o*), as to the allowed scale of profits and charges. The Act of 1872 applies (1) to every loan by a pawnbroker of forty shillings or under, and (2) to every loan by a pawnbroker of above forty shillings and not above ten pounds, except in the case of a special contract as authorised by the Act between the pawnor and pawnbroker at the time of the pawning (*p*). The Act contains general regulations for the carrying on of the business, which provide that on taking a pledge the pawnbroker shall deliver a pawn ticket to the pawnor, and includes a scale of profits and charges. Every pledge is redeemable by the holder for the time being of the pawn ticket (*q*) within twelve months from the day of pawning and seven days of grace (*r*). If a pledge for ten shillings or under has not been redeemed within the time, it becomes the pawnbroker's absolute property (*s*); but a pledge for above ten shillings remains redeemable until disposed of (*t*), and such disposition must be by sale by auction as prescribed by the Act (*u*), the holder of the ticket being entitled to any surplus if claimed within three years of the sale (*x*). The provisions of the Act

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(*l*) 41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43.
(*m*) *Ex p. Hubbard, sup.*
(*n*) 35 & 36 Vict. c. 93.
(*o*) 12 Geo. 5, c. 5.
(*p*) Act of 1872, ss. 10, 24.
(*q*) *Ib.* s. 25.
(*r*) *Ib.* s. 16.
(*s*) *Ib.* s. 17.
(*t*) *Ib.* s. 18.
(*u*) *Ib.* s. 19.
(*x*) *Ib.* s. 22.

do not, however, affect the common law rights of the owner of property which has been pledged without his authority (*y*). The pawnor is protected against loss by fire, or by depreciation in value of the pledge through the pawnbroker's default (*z*).

Common carriers.

A common carrier is one who offers for hire at a reasonable rate, as a business and not as a casual employment on a particular occasion, to carry goods for anyone who brings them (*a*). The owner of a ship, plying between certain ports and carrying the goods of all comers as a general ship, as distinguished from a ship hired to carry a specific cargo, is a common carrier (*b*).

A common carrier is liable for all loss or damage to the goods entrusted to him, except where caused by the act of God (*c*) or a public enemy, or a defect in the thing itself (*d*), or the negligence of the person employing him, as, for instance, by the goods being carelessly packed. He is bound to go by the accustomed route and to deliver within a reasonable time (*e*), and his common law liability is the same whether he carries by land or water (*f*). His duty to carry the goods safely

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(*y*) *Singer Co.* v. *Clark* (1879), 5 Ex. D. 37; *Burrows* v. *Barnes* (1900), 82 L. T. 721; *Leicester* v. *Cherryman*, [1907] 2 K. B. 101. See *Cheesman* v. *Exall* (1851), 6 Ex. 341.

(*z*) Act of 1872, ss. 27, 28.

(*a*) *Liver Alkali Co.* v. *Johnson* (1874), L. R. 9 Ex. 338; *Consolidated, &c. Co.* v. *Oliver's*, [1910] 2 K. B. 395; *Belfast Ropework Co.* v. *Bushell*, [1918] 1 K. B. 210.

(*b*) *Nugent* v. *Smith* (1876), 1 C. P. D. 427.

(*c*) As to the meaning of the "act of God," see *Nugent* v. *Smith*, *sup.*; *Nichols* v. *Marsland* (1876), L. R. 10 Ex. 255; 2 Ex. D. 1; *Nitro-phosphate Co.* v. *London and St. Kath. Docks Co.* (1877), 9 Ch. D. 503.

(*d*) Co. Litt. 89*a*; 22 Lib. Assis. pl. 41; *Nugent* v. *Smith*, *sup.*; *Blower* v. *G. W. R. Co.* (1872), L. R. 7 C. P. 655 (animals); *Kendal* v. *L. & S. W. R. Co.* (1872), L. R. 7 Ex. 373 (animals); *Lister* v. *Lancashire and Yorkshire R. Co.*, [1903] 1 K. B. 878 (engine).

(*e*) *Hales* v. *L. & N. W. R. Co.* (1863), 4 B. & S. 66; *Taylor* v. *G. N. R. Co.* (1866), L. R. 1 C. P. 385.

(*f*) *Rich* v. *Kneeland* (1614), Cro. Jac. 330; Hob. 17; 2 Lev. 69; *Nugent* v. *Smith*, *sup.* The Carriage of Goods by Sea Act, 1924, has introduced certain statutory rules applied to the carriage of goods by sea (except in the case of coasting voyages) in ships carrying goods from any port in Great Britain and Northern Ireland.

does not depend on contract, but is a liability thrown on him by law (*g*).

A carrier may limit his liability by an express contract, which, in the case of a ship, is usually contained in the bill of lading.

Where the goods are carried under a contract that they are to be at the "owner's risk," the carrier is free from his liability as an insurer, but, in the absence of special terms exempting him from liability in such events, he is liable as bailee for ordinary negligence and for breach of his undertaking to deliver at the proper time (*h*).

Carriers Act.

The Act known as the Carriers Act (*i*) provides that common carriers by land are not to be liable for the loss of goods of certain classes above the value of £10 (in the case of railways, £25 (*k*)) unless the value and nature of the goods are declared by the person sending them, and such increased payment as is notified by a conspicuous notice in the office where the goods are received is paid. In this section "loss" means loss by the carrier, not the loss occasioned to the owner by delay in delivery (*l*). Railway and canal companies are incapable of restricting their liability for loss or injury occasioned by their neglect or default (*m*), including loss in respect of steam vessels worked by railway companies (*n*), except by conditions which "appear to the Court to be just and reasonable," and which are contained in a contract signed by the party or the

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(*g*) *Pozzi* v. *Shipton* (1838), 8 A. & E. 963; 47 R. R. 802.

(*h*) *D'Arc* v. *L. & N. W. R. Co.* (1874), L. R. 9 C. P. 325; *Mitchell* v. *L. & Y. R. Co.* (1875), L. R. 10 Q. B. 256; and see *Price* v. *Union Lighterage Co.*, [1904] 1 K. B. 412. "Owner's risk" consignment notes now usually contain terms exempting from liability except on proof of wilful misconduct. On the construction of such notes, see *G. W. R. Co.* v. *Wills*, [1917] A. C. 148; *Buckton & Co.* v. *L. & N. W. R. Co.* (1917), 34 T. L. R. 119; *Neilson* v. *L. & N. W. R. Co.*, [1922] 1 K B. 192.

(*i*) 11 Geo. 4 & 1 Will. 4, c. 68.

(*k*) Railways Act, 1921, s. 56, Sched. VI.

(*l*) *Hearn* v. *L. & S. W. R. Co.* (1855), 10 Ex. 793.

(*m*) See *Shaw* v. *G. W. R. Co.*, [1894] 1 Q. B. 373.

(*n*) See *The Stella*, [1900] P. 161.

person delivering the goods to the company (*o*). Railway companies are common carriers of passengers' personal (*p*) luggage, whether carried in the luggage van or in the carriage with the passenger (*q*).

Shipowners' liability.

The common law liability of a shipowner is limited by the Merchant Shipping Act, 1894 (*r*), which prevents him from being liable for loss arising without his fault or privity, or for fire (*s*) on board ship, or for loss in respect of certain articles specified in the Act, unless the owner or shipper declares the nature and value thereof at the time of shipping: and in certain cases from being liable for more than the value of the ship and freight: and his liability is limited in some cases to £15, and in other cases to £8, per ton of the ship's tonnage (*t*).

Common carriers.

The position of a common carrier is somewhat peculiar. He is bound to receive goods for carriage, and is unable to make any enquiry as to the ownership. If goods are delivered to a carrier by a pseudo-owner, the carrier is safe if he delivers the goods in pursuance of his directions without any knowledge of the true owner's claim. In like manner he is safe, as against the pseudo-owner from whom he could not refuse to accept the goods, if the true owner claims the goods and he gives them up to him. He is not estopped from disputing the title of the person from whom he received the goods (*u*).

Innkeepers.

At common law, innkeepers, like carriers, are liable

(*o*) The Railway and Canal Traffic Acts, 1854 and 1888 (17 & 18 Vict. c. 31, s. 1; 51 & 52 Vict. c. 25); Railways Act, 1921 (11 & 12 Geo. 5, c. 55), ss. 42-44; *Peek* v. *N. Staff. R. Co.* (1863), 10 H. L. Cas. 473; *Doolan* v. *Mid. R. Co.* (1876), 2 App. Cas. 792; *M. S. & L. R. Co.* v. *Brown* (1883), 8 *Id.* 703; *G. W. R. Co.* v. *McCarthy* (1887), 12 *Id.* 218; *Sutcliffe* v. *G. W. R. Co.*, [1910] 1 K. B. 478; *Buckton & Co.* v. *L. & N. W. R. Co.* (1917), 34 T. L. R. 119.

(*p*) See *Britten* v. *G. N. R. Co.*, [1899] 1 Q. B. 243; *Casswell* v. *Cheshire Lines*, [1907] 2 K. B. 499.

(*q*) *G. W. R. Co.* v. *Bunch* (1888), 13 App. Cas. 31.

(*r*) 57 & 58 Vict. c. 60, ss. 502, 503; amended by 61 & 62 Vict. c. 14, and 6 Edw. 7, c. 48, ss. 69-71.

(*s*) *Greenshields* v. *Stephens*, [1908] 1 K. B. 51.

(*t*) 57 & 58 Vict. c. 60, s. 503.

(*u*) Macnamara on Carriers, p. 80; *Sheridan* v. *New Quay Co.* (1858), 4 C. B. (N.S.) 649.

for all loss of or damage to goods entrusted to them, unless arising from the act of God or the King's (*i.e.*, public) enemies, or the negligence of the guest (*x*).

But under the Innkeepers Act, 1863, an innkeeper may protect himself from liability to make good any loss of property brought to his inn (not being a horse or other live animal, or any gear appertaining thereto, or any carriage) to a greater amount than £30, except when the property shall have been stolen, lost, or injured through the wilful act, default, or neglect of himself or his servant, or when the property has been deposited expressly for safe custody with him (*y*).

Duty of bailor.

It is the duty of a person delivering a thing to another not to conceal from the bailee any defects known to him which may render the use of the thing perilous to the bailee (*z*); but the bailor is not liable for injury to the bailee arising from a defect unknown to him (*a*).

Dangerous or defective chattel.

Consequently it is the duty of a person who gives dangerous goods to a carrier, whether by land or sea, to give notice of their character to him (*b*); and he impliedly warrants that the goods are not dangerous, but are fit for carriage in the ordinary way, unless the carrier knows, or ought to know, that the goods are dangerous (*c*). It is the duty of the letter in contracts of hiring to supply a thing reasonably fit for the purpose for which it is intended to be used (*d*), unless the hiring is of a specific and agreed chattel (*e*).

(*x*) *Calye's Case* (1584), 8 Co. Rep.

(*y*) 26 & 27 Vict. c. 41; *Whitehouse* v. *Pickett*, [1908] A. C. 357; *Medawar* v. *Grand Hotel Co.*, [1891] 2 Q. B. 11.

(*z*) *Blakemore* v. *Bristol and Exeter R. Co.* (1858), 8 E. & B. 1035.

(*a*) *MacCarthy* v. *Young* (1861), 6 H. & N. 329; *Coughlin* v. *Gillison*, [1899] 1 Q. B. 145.

(*b*) As to specially dangerous goods, see the Explosives Act, 1875 (38 & 39 Vict. c. 17); the Merchant Shipping Act, 1894, ss. 446-450.

(*c*) *Bamfield* v. *Goole Co.*, [1910] 2 K. B. 94.

(*d*) *Fowler* v. *Lock* (1874), L. R. 7 C. P. 272; 10 *Id.* 90; *Hyman* v. *Nye* (1881), 6 Q. B. D. 695; *Marney* v. *Scott*, [1899] 1 Q. B. 986; *Vogan* v. *Oulton* (1898), 79 L. T. 384.

(*e*) *Robertson* v. *Amazon Tug Co.* (1881), 7 Q. B. D. 598.

§ 2. *Possessory Lien* (*f*).

Possessory lien defined.

Equitable lien.

Where a person in possession of goods which belong to another has a right to retain them until his pecuniary demands against that other are satisfied, he is said to have a possessory lien on the goods. A possessory lien does not give any right to sell the goods (*g*). There are a few cases in which the term "lien" is applied to certain priorities that a creditor may obtain over property not in his possession. Liens of this nature are equitable liens, or maritime liens (*h*). They are independent of possession, and are merely rights to have specific property applied in satisfaction of the creditor's claim.

How liens arise and are lost.

Parting with possession.

No lien arises unless the goods have come lawfully into the possession of the person claiming the lien (*i*) in the ordinary course of business, and not for a special purpose inconsistent with the lien. There is no lien where, from the nature of the transaction, the possession of the holder is subject to the owner's right of disposition (*k*). The lien is generally, though not always, lost by abandoning the possession of the goods (*l*); but it is not lost by putting them in the possession of a bailee for safe custody (*m*). Nor is it lost by parting with the subject-matter for a specific and definite purpose (*n*). Where the lien is lost by voluntarily parting with the possession, it is not revived by re-acquiring possession; *secus*, if the loss of possession is involuntary.

(*f*) Fisher on Mortgages (ed. 6), 307; Tudor, L. C. Merc. Law, 363 (notes to *Kruger* v. *Wilcox*).

(*g*) *Mulliner* v. *Florence* (1878), 3 Q. B. D. 484.

(*h*) We shall not discuss equitable liens; as to maritime liens, see *post*, Chap. VII.

(*i*) *Madden* v. *Kempster* (1807), 1 Camp. 12; *Sunbolf* v. *Alford* (1838), 3 M. & W. 248; 49 R. R. 593.

(*k*) *Forth* v. *Simpson* (1849), 13 Q. B. 680; *Hatton* v. *Car Maintenance Co.*, [1915] 1 Ch. 621.

(*l*) *Kruger* v. *Wilcox* (1753), Ambl. 252; 1 Dick. 269; Tudor, L. C. Merc. Law, 353; *G. E. R. Co.* v. *Lord's Trustee*, [1909] A. C. 109.

(*m*) *Wilson* v. *Kymer* (1813), 1 M. & S. 157. See also Part VII of Merchant Shipping Act, 1894, *post*, p. 43.

(*n*) *Albemarle Supply Co.* v. *Hind & Co.*, [1928] 1 K. B. 307.

There are, however, a few exceptional cases where, though the goods are voluntarily parted with, the lien revives on possession being re-acquired; for instance, an insurance broker, who effects a policy, loses his lien on the policy by voluntarily parting with it, but the lien revives if he regains possession of the policy (*o*). If a guest at an inn places a horse in the inn stables, the innkeeper does not lose his lien when the guest takes and uses the horse with the intention of returning it (*p*).

Taking security.

A lien is also in many cases lost by taking security; whether or not it is lost by taking a security depends upon the intention expressed or to be inferred from the position of the parties and all the circumstances of the case (*q*).

"Particular" and "general" lien distinguished.

Possessory liens are either "particular" (sometimes called "specific") or "general." A particular lien enables the possessor to retain the goods until payment of a debt due in respect of them; a general lien gives a right to retain the goods until any general balance of account due from the owner to the possessor is paid (*r*). Apart from contract, express or implied, it may be said that particular lien is given by common law and general lien by custom or usage (*s*), which may be considered as adding an implied term to the principal contract. Particular liens are, but general liens are not, favoured by the law (*t*).

Particular lien.

A particular lien may arise (1) at common law, (2) by express contract, (3) by implied contract.

A particular lien arises at common law in favour of a person in possession of goods in three different cases:—

(*o*) *Levy* v. *Barnard* (1818), 2 J. B. Moo. 34.

(*p*) *Allen* v. *Smith* (1863), 12 C. B. (N.S.) 638; 11 W. R. 440.

(*q*) *Re Taylor*, [1891] 1 Ch. 590, 597; *Angus* v. *McLachlan* (1883), 23 Ch. D. 330; *Re Bowes* (1886), 33 Ch. D. 586.

(*r*) *Anglo-Italian Bank* v. *Davies* (1878), 9 Ch. D. 289, per Brett, L.J.; *Jowitt & Sons* v. *Union Cold Storage Co.*, [1913] 3 K. B. 1.

(*s*) *Houghton* v. *Matthews* (1803), 3 B. & P. 494; 7 R. R. 815.

(*t*) *Rushforth* v. *Hadfield* (1805), 7 East, 224; 8 R. R. 520; *Jacobs* v. *Latour* (1828), 5 Bing. 132; cf. *Cassils & Co.* v. *Holden Wood Bleaching Co.* (1915), 84 L. J. K. B. 834.

(1) Where he has bestowed labour, or skill, or expense upon or in dealing with the goods (*u*);

(2) Where he is compellable to receive the goods or perform the services in respect of which he claims the lien (*x*); and

(3) Where he has saved the chattel from loss at sea or capture by an enemy (*y*).

Lien in respect of work, etc.

(1) A lien claimed in respect of labour done or expense incurred in respect of goods can only be enforced against the owner if it was done or incurred at his request or by his authority, express or implied (*z*), except in the cases of a carrier or innkeeper (*a*); but subject to the rights of the owner, it may be enforced against any person at whose request or by whose authority the work or expense was done or incurred (*b*).

The lien does not arise until the work undertaken is completely performed (*c*); but if the owner of the chattel prevents the work from being completely performed there is a lien for the work actually done (*d*).

The lien is only upon the chattel on which the work is done, not on any chattel delivered to the workman to enable him to do the work, as, for instance, a coat sent to a tailor as a pattern. But where the work is an entire work, and is done on several chattels, the lien extends to all of them (*e*).

(*u*) *Franklin* v. *Hosier* (1821), 4 B. & Ald. 341; 23 R. R. 305; *Chase* v. *Westmore* (1816), 5 M. & S. 180; 17 R. R. 301; *Ex p. Willoughby* (1881), 16 Ch. D. 604; *Hollis* v. *Claridge* (1813), 4 Taunt. 807; stated 39 R. R. 662, 663; *Scarfe* v. *Morgan* (1838), 4 M. & W. 270; 51 R. R. 568; *Keene* v. *Thomas*, [1905] 1 K. B. 136.

(*x*) *Yorke* v. *Grenaugh* (1703), 2 Ld. Raym. 866; *Thompson* v. *Lacy* (1820), 3 B. & Ald. 283; 22 R. R. 385; *Robins* v. *Gray* (1895), 2 Q. B. 501.

(*y*) See *post*, p. 44, and Chap. VII.

(*z*) *Nicholson* v. *Chapman* (1793), 2 H. Bl. 254; 3 R. R. 374; *Keene* v. *Thomas*, [1905] 1 K. B. 136; *Electric Supply Stores* v. *Gaywood* (1909), 100 L. T. 855; *Cassils & Co.* v. *Holden Wood Bleaching Co., ubi sup.*; *Green* v. *All Motors, Lim.*, [1917] 1 K. B. 625; *Albemarle Supply Co.* v. *Hind & Co.*, [1928] 1 K. B. 307.

(*a*) See *infra*.

(*b*) *Hollis* v. *Claridge*, *sup.*

(*c*) Per Parke, B., *Pinnock* v. *Harrison* (1838), 3 M. & W. 535.

✓ (*d*) *Lilley* v. *Barnsley* (1843), 2 M. & Rob. 548.

(*e*) *Blake* v. *Nicholson* (1814), 3 M. & S. 167; 15 R. R. 455.

Chap. II.

Innkeepers (*f*).

(2) An innkeeper is bound to receive every traveller (*g*) who applies to be admitted as a guest (*h*), so long as there is room for him in the house (*i*), and no good reason for refusing to receive him, and also to receive his luggage and other goods reasonably necessary or useful for the purposes of his sojourn at the inn. He is liable at common law to an action or an indictment if he refuses to receive without reasonable cause (*k*). He has, in return, a lien on the goods brought to the inn by the guest as his goods (*l*), whether they belong to him or not (*m*); but not on goods brought to the inn by a person who is not a guest (*n*), or on goods supplied by a third person for the temporary use of the guest at the inn and of a character which the innkeeper would be under no legal obligation to receive (*o*).

The lien is on all the goods brought by the guest to the inn in respect of the whole of the innkeeper's bill against the guest (*p*).

It has been held that the innkeeper has a lien on goods which are the separate property of a married woman, where she and her husband stay at an inn and credit is given to the husband (*q*).

Innkeepers Act, 1878.

In addition to the innkeeper's rights under his ordinary lien he has, by the Innkeepers Act, 1878, a power to sell by public auction, after giving notice by advertisement in the manner provided by the Act at least a month before the sale, goods which have been left in his charge or custody for six weeks, and to

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(*f*) See notes to Calye's Case, 1 Sm. L. C. (ed. 13), 124.

(*g*) *Lamond* v. *Richard*, [1897] 1 Q. B. 541.

(*h*) *Orchard* v. *Bush*, [1898] 2 Q. B. 284.

(*i*) *Browne* v. *Brandt*, [1902] 1 K. B. 696.

(*k*) *Hawthorn* v. *Hammond* (1844), 1 C. & K. 404; *Gordon* v. *Silber* (1890), 25 Q. B. D. 491.

(*l*) *Thompson* v. *Lacy*, *sup.*

(*m*) *Yorke* v. *Grenaugh*, *sup.*; *Threfall* v. *Borwick* (1875), L. R. 10 Q. B. 210; *Gordon* v. *Silber*, *sup.*; *Robins* v. *Gray*, [1895] 2 Q. B. 501.

(*n*) *Calye's Case*, *sup.*; *Smith* v. *Dearlove* (1848), 6 C. B. 132.

(*o*) *Broadwood* v. *Granara* (1854), 10 Ex. 417. See *Robins* v. *Gray*, *sup.*

(*p*) *Mulliner* v. *Florence* (1878), 3 Q. B. D. 484.

(*q*) *Gordon* v. *Silber*, *sup.*

reimburse himself out of the proceeds the amount due to him from the person depositing the goods, for board or lodging or the keep and expenses of horses or other animals (*r*).

Carriers.

A carrier has a lien on the goods that he carries for his charge for the carriage (*s*), but not for charges for booking or warehouse room (*t*), though by the usage of a particular trade, or by special bargain, his lien may extend to charges of this nature (*u*), and, as in the case of innkeepers, by reason of his obligation to receive and carry goods, he may detain them against the true owner until the charge for carriage be paid (*x*).

Shipowners.

The owner of a ship has a lien on the goods carried by him for the freight, *i.e.*, the sum payable to him for the carriage of the goods, when he is ready and able to deliver them (*y*); and he has a lien upon the luggage of a passenger for his passage money (*z*). It is provided by Part VII. of the Merchant Shipping Act, 1894, that if the owner of goods imported in any ship from abroad fails to take delivery or to land the goods at the time fixed by agreement, or if no time is fixed, within seventy-two hours, the shipowner may land the goods and place them at a wharf or warehouse, and on giving written notice to the wharfinger or warehouseman retain his lien for freight. If the charges for customs, dues, freight and expenses are not discharged within ninety days they may be realised by sale of the goods or any part of them by public auction, after notice by advertisement as prescribed in the Act. In the case of perishable goods the sale may be at an earlier period (*a*). If the shipowner

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(*r*) 41 & 42 Vict. c. 38.

(*s*) Per Lord Ellenborough, C.J., *Rushforth* v. *Hadfield* (1805), 6 East, 525.

(*t*) *Lambert* v. *Robinson* (1793), 1 Esp. 119.

(*u*) *Rushforth* v. *Hadfield*, *sup.*

(*x*) *Yorke* v. *Grenaugh* (1703), 2 Ld. Raym. 866, 867, per Holt, C.J. See *Electric Supply Stores* v. *Gaywood* (1909), 100 L. T. 855.

(*y*) *Kirchner* v. *Venus* (1859), 12 Moore, P. C. 390.

(*z*) *Wolf* v. *Summers* (1811), 2 Camp. 631; 12 R. R. 764.

(*a*) 57 & 58 Vict. c. 60, ss. 493-499.

is prevented from delivering the goods by their nature, *i.e.*, owing to goods of that nature being prohibited by law from being landed, he also has a lien for the costs of storage and back freight, *i.e.*, the costs of bringing them back to the port of shipment (*b*). Where the cargo is consigned to separate consignees, the part sent to each consignee is subject only to the freight earned in respect of it (*c*). The lien is of course lost by delivery of the goods (*d*).

Salvage.

(3) In the case of voluntary services rendered in circumstances of danger to property, *e.g.*, ships, at sea, resulting in the saving of the property, the salvors have a lien on the property at common law (*e*). This is now governed by the provisions of the Merchant Shipping Acts (*f*). A lien also arose in the case of property saved from capture by enemies. This is, at the present day, a matter dealt with by the Prize Court and regulated by Statutes relating to maritime capture.

Lien by express contract.

A lien which is created by express contract may extend to a case where no lien at common law would arise, and is regulated entirely by the terms of that contract; and, where a lien arises at common law, it may be varied or restricted by contract; if a contract contains terms inconsistent with the existence of a lien, then no lien can arise (*g*).

Implied lien.

Where no lien exists by common law or express contract, it may be implied either from previous dealings between the same parties or from a general and notorious usage of trade (*h*).

General lien.

By a general lien is meant the right of persons exer-

(*b*) *Cargo ex Argos* (1873), L. R. 5 P. C. 134.

(*c*) *Bernal* v. *Pim* (1835), 1 Gale, 17.

(*d*) *North* v. *Gurney* (1860), 1 J. & H. 509. See s. 494 of the Merchant Shipping Act, 1894.

(*e*) *Hartford* v. *Jones* (1699), 1 Ld. Raym. 393.

(*f*) *Post*, Chap. VII.

(*g*) *Chase* v. *Westmore* (1816), 5 M. & S. 180; 17 R. R. 301; Tudor's L. C. Merc. Law, 356; *Crawshay* v. *Homfray* (1820), 4 B. & Ald. 50; 22 R. R. 618; *Foster* v. *Colby* (1864), 3 H. & N. 705; *Ex p. Willoughby* (1881), 16 Ch. D. 604; *Re Leith* (1865), L. R. 1 P. C. 305.

(*h*) *Rushforth* v. *Hadfield* (1805), 7 East, 224; 8 R. R. 520.

cising certain professions or carrying on certain kinds of business, to retain property of the client or customer coming into their possession in their professional or business capacity, not only in respect of services rendered about the particular property, but also in respect of a general balance of account for work done in connection with such profession or business.

It arises :—

(1) In those professions or classes of business in which it is usual for advances to be made by the person employed in the business to or on behalf of the client or customer (*i*).

(2) In other cases, by usage.

If it can be shown that, according to the custom of any particular trade, it is usual for advances to be made by the bailee to the owner of the goods, the right to a general lien is admitted (*i*); but, in other cases, where it is alleged that the lien exists by usage, the usage must be proved to exist (*k*). A general lien may be excluded by express contract; for example, a factor, to whom goods are consigned, does not acquire a general lien on the goods if he accepts the consignment subject to special directions as to the application of the cargo or the proceeds of sale of it (*l*).

Where a person claims a general lien by usage, he must show that the general balance that he claims arises from, and that the goods were delivered to him in, exercise of a business in respect of which the usage exists (*m*).

General lien does not affect rights of third parties.

A general lien does not affect the rights of third parties (*n*); so that, if, for example, a common carrier obtains, by agreement with the consignee, a lien for the

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(*i*) *Bock* v. *Gorrissen* (1861), 2 De G. F. & J. 434.

(*k*) *Bock* v. *Gorrissen*, *sup.*; *Cassils & Co.* v. *Holden Wood Bleaching Co.*, [1915] 84 L. J. K. B. 834.

(*l*) *Frith* v. *Forbes* (1862), 4 De G. F. & J. 409.

(*m*) *Dixon* v. *Stansfeld* (1850), 10 C. B. 398.

(*n*) *Wright* v. *Snell* (1822), 5 B. & Ald. 350; 24 R. R. 413.

general balance of account between them, this does not prevent the consignor from stopping *in transitu* (*o*).

Factors.

"A factor is a person to whom goods are consigned for sale by a merchant residing abroad or at a distance from the place of sale; and he usually sells in his own name without disclosing that of his principal" (*p*). "He is an agent, but an agent of a particular kind. He is an agent entrusted with the possession of goods for the purpose of sale" (*q*). A mere agent has (as such) no lien, but a factor has a general lien on goods; and he does not lose his character of factor or the right of lien attached to it by reason of special instructions to sell goods at a specified price and in the name of the principal (*r*).

It is the custom for factors to make advances to their principals, and therefore (*s*) a factor has a lien over goods which come into his possession as factor (*t*), which lien extends not only to those advances but to the general balance of his account against his principal arising from his employment (*u*).

Solicitor's lien.

An important example of a general lien is that which a solicitor has for the amount of his bill on papers of his client, except his will (*x*), which have come into his possession as solicitor (*y*) but not on those which have come into his possession in some other capacity (*z*); and the lien is confined to what is due to him in his character of solicitor, and does not extend to general debts (*a*).

(*o*) *Oppenheim* v. *Russell* (1802), 3 B. & P. 42; 6 R. R. 604. *Post*, p. 78, as to stoppage *in transitu*.

(*p*) Per Abbott, C.J., *Baring* v. *Corrie* (1818), 2 B. & Ald. 143; 20 R. R. 383.

(*q*) Per Cotton, L.J.., *Stevens* v. *Biller* (1883), 25 Ch. D. 31, 37.

(*r*) *Stevens* v. *Biller*, *sup.*

(*s*) *Kinloch* v. *Craig* (1790), 3 T. R. 119, 783; 1 R. R. 664.

(*t*) *Dixon* v. *Stansfeld*, *sup.*

(*u*) *Houghton* v. *Matthews* (1803), 3 B. & P. 485; 7 R. R. 815.

(*x*) *Balch* v. *Symes* (1823), T. & R. 87; 23 R. R. 195. See, generally, Seton on Decrees, Ch. XL., s. 2 (1).

(*y*) *Sheffield* v. *Eden* (1878), 10 Ch. D. 291. The lien has been held to extend to articles delivered to the solicitor to be shown to witnesses on a trial: *Friswell* v. *King* (1846), 15 Sim. 191.

(*z*) *Champernown* v. *Scott* (1821), 6 Mad. 93; 22 R. R. 248; *Gibson* v. *May* (1853), 4 De G. M. & G. 512.

(*a*) *Re Galland* (1885), 31 Ch. D. 296.

The lien "is not the result of contract; it is not an equitable charge; it is not an incumbrance affecting the estate itself. . . . It does not confer on the solicitor any higher right to retain deeds than the client himself has" (*b*).

As the lien is only on the interest in the papers that the client has, it cannot continue after the interest of the client has determined (*c*), and it may be defeated by some person showing a better right to the deeds, or the property to which they relate, than the client has (*d*). Accordingly, if by the judgment in an action the client is ordered to deliver up deeds, his solicitor who holds them cannot withhold possession on account of his lien; and where a client is bound to produce a deed in the possession of his solicitor, the latter must produce it notwithstanding his lien (*e*); and a party will be ordered to produce documents which are in the hands of his former solicitor who claims a lien on them (*f*).

Order to give up or produce papers for purpose of proceedings.

"A solicitor cannot embarrass a suit by keeping papers which belong to an estate which is being administered by the Court, and cannot use that means of obtaining payment" (*g*). Accordingly, a solicitor will be ordered to hand over or produce documents so as to enable the matter to proceed, his lien being preserved (*h*).

The Court has jurisdiction, upon payment being made into Court of, or security given for, a sum sufficient to answer the solicitor's demand, to order, before taxation, delivery up by a solicitor of his client's papers, where the retention of them would embarrass the client in the prosecution or defence of a pending action (*i*).

(*b*) Per Chitty, J., *Re Llewellin*, [1891] 3 Ch. 145.

(*c*) *Re Llewellin, sup.*

(*d*) *Re Union Brick Co.* (1869), 4 Ch. 627.

(*e*) *Hope* v. *Liddell* (1855), 7 De G. M. & G. 331.

(*f*) *Lewis* v. *Powell*, [1897] 1 Ch. 678.

(*g*) Per James, L.J., *Belaney* v. *Ffrench* (1873), 8 Ch. 918, 920; *Re Hawkes*, [1898] 2 Ch. 1.

(*h*) *Re Hawkes, sup.*; *Boughton* v. *Boughton* (1883), 23 Ch. D. 169; *Re Capital Fire, &c., Assoc.* (1883), 24 Ch. D. 408; *Boden* v. *Hensby*, [1892] 1 Ch. 101.

(*i*) *Re Galland, sup.*

London agent.

The London agent of a country solicitor has a lien on the papers of the client received from the country solicitor to the extent only of the debt due to the latter from the client in the particular business, and so long only as the country solicitor remains unpaid (*k*). As against the country solicitor the agent's lien is general, but as against the client it is particular (*l*).

Subject to equities.

The lien is subject to all equities affecting the papers at the time when the solicitor received them (*m*), and as to costs incurred after that time to any equities arising before the costs are incurred (*n*).

In respect of what claims.

The lien extends only to the solicitor's taxable costs charges and expenses incurred by him as solicitor for his client, including counsel's fees and all other disbursements which can be moderated by the taxing master and are not necessarily allowed in full on being vouched; but it does not include ordinary advances or loans (*o*).

As against whom.

It can be asserted only against persons by whom or on whose behalf the solicitor was employed and persons claiming under them. It follows that the solicitor of a mortgagee, whether the mortgage is completed or goes off, has no lien as against the mortgagor (*p*), and on the same principle, the mortgagee's solicitor cannot, after the mortgagee has been paid his principal, interest, and costs, assert his lien on the title deeds as against the mortgagor for the mortgagee's costs (*q*). And a solicitor acting for mortgagee as well as mortgagor in the preparation of a mortgage has no lien on title deeds for costs due to him from the mortgagor, unless such lien be expressly given (*r*). A solicitor who has prepared

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(*k*) *Bray* v. *Hine* (1818), 6 Price, 203; 20 R. R. 623; *Re Jones and Roberts*, [1905] 2 Ch. 219.

(*l*) *Lawrence* v. *Fletcher* (1879), 12 Ch. D. 858.

(*m*) *Pelly* v. *Wathen* (1849), 1 De G. M. & G. 16.

(*n*) *Blunden* v. *Desart* (1842), 2 Dr. & War. 405; 59 R. R. 753.

(*o*) *Re Taylor*, [1891] 1 Ch. 590.

(*p*) *Pratt* v. *Vizard* (1833), 5 B. & Ad. 808.

(*q*) *Wakefield* v. *Newbon* (1844), 6 Q. B. 276; *Re Llewellin*, [1891] 3 Ch. 145.

(*r*) *Re Snell* (1877), 6 Ch. D. 105; distinguished in *Macfarlane* v. *Lister* (1887), 37 Ch. D. 88, and *Brunton* v. *Electrical Corporation*, [1892] 1 Ch. 434.

a marriage settlement upon the instructions of the husband has no lien upon it as against the trustees (*s*).

Taking security.

The solicitor may lose his lien by taking security for his costs (*t*); but "whether a lien is waived or not by taking a security depends upon the intention, expressed or to be inferred from the position of the parties and all the circumstances of the case" (*u*); and when a solicitor takes any security which is inconsistent with the retention of a lien (*x*), and, probably, when it is his duty to give his client clear information as to the facts and to advise him of his rights and liabilities, and he takes a security for costs without explaining that he intends to reserve his lien (*y*), the presumption is that the lien is abandoned.

Discharge of solicitor.

If the client discharges the solicitor or becomes bankrupt, the solicitor may decline to give access to the papers over which he has a lien till he is paid (*z*); but if the solicitor discharges himself during the progress of an action, he may be ordered to give up the papers to the new solicitors, on their undertaking to hold them without prejudice to his lien, and to return them undefaced, and to allow him to have access to them for the purpose of bringing an action for his costs (*a*).

Lien on sale moneys.

It is sometimes said that the general lien of a factor, and the particular lien of an auctioneer, on goods placed in his possession for the purposes of sale, extends to the purchase-money of goods sold by him and delivered to the purchaser (*b*). The explanation appears to be that, in the supposed cases, the factor or auctioneer has a right to have the purchase-money paid to him; and so

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(*s*) *Re Lawrance*, [1894] 1 Ch. 556.

(*t*) *Balch* v. *Symes* (1823), T. & R. 92; 23 R. R. 195; *Cowell* v. *Simpson* (1809), 16 Ves. 275; 10 R. R. 181.

(*u*) Per Lindley, L.J., *Re Taylor*, *sup.*

(*x*) *Re Morris*, [1908] 1 K. B. 473.

(*y*) Per Kay, L.J., *Re Taylor*, *sup.; Re Douglas Norman & Co.*, [1898] 1 Ch. 199; *Re Morris*, *sup.*

(*z*) *Re Faithfull* (1868), 6 Eq. 325.

(*a*) *Robins* v. *Goldingham* (1872), 13 Eq. 440.

(*b*) *Williams* v. *Millington* (1788), 1 H. Bl. 81; 2 R. R. 724; *Robinson* v. *Rutter* (1855), 4 E. & B. 954; consider *Webb* v. *Smith* (1885), 30 Ch. D. 192, and *Bellamy* v. *Davey*, [1891] 3 Ch. 540.

can satisfy his claim by deducting what is due to him. It is rather an abuse of language to say that a lien attaches on the purchase-money before it is paid, for, if the purchaser pays the principal, the remedy of the factor or auctioneer is not against the principal to enforce a lien but against the purchaser to make him pay.

Other classes of persons who have been held to have general liens are bankers, wharfingers, stockbrokers, policy brokers, dyers, cotton printers, and packers. The lien of an unpaid seller is fully dealt with in the next chapter.

CHAPTER III.

SALE OF GOODS.

§ 1. *Transfer of property in goods by sale—When property passes—Formalities—S. 4 of the Sale of Goods Act,* 1893.

THE property in corporeal chattels can be transferred by act *inter vivos* in the several manners following:—

(1) By delivery of possession with intent to pass the ownership;

(2) By a contract for sale called a bargain and sale, or a sale and delivery (*a*);

(3) By the indorsement and delivery of the bill of lading of goods on board ship (*b*);

(4) By deed or instrument in writing called a "bill of sale" (*c*).

Nemo dat quod non habet.

As a general rule, a man cannot transfer the ownership of goods unless he is the owner of them, and a buyer obtains no better title to them than the seller has (*d*). This rule is subject to some exceptions, viz.:—

Exceptions: Negotiable instruments;

(1) Current coin, if passed as coin (*e*), and negotiable instruments (*f*);

(*a*) Serjeant Manning, in a learned note to *Bailey* v. *Culverwell* (2 M. & Ry. 566, n.), expresses an opinion that the rule that the property passes by the bargain and sale without delivery is modern, and that it is an anomaly arising from the assumption that, because the thing sold is at the risk of the purchaser, therefore it belongs to him; and he cites Y. B. 17 Edw. 4, 1 and 2, pl. 2. This note is discussed in Blackburn on Sale (ed. 3), pp. 283 *et seq.*, where it is pointed out that Serjeant Manning misunderstood the case (see 1 Plow. 11 a). In *Wortes* v. *Clifton* (1 Rolle, Rep. 61), Coke says that by the civil law a gift (*done*, which does not necessarily imply a want of consideration) of goods is not good without delivery, but that it is otherwise by our law.

(*b*) *Post*, p. 87.

(*c*) *Post*, Chap. VI.

(*d*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 21 (1).

(*e*) *Moss* v. *Hancock*, [1899] 2 Q. B. 111.

(*f*) *Post*, Chap. X.

Estoppel;

(2) The owner of the goods may by his conduct preclude himself from denying the authority of the seller to sell (*h*).

A case falls under this exception where the owner makes some statement or does some act with reference to the goods which is such as to induce any reasonable person in the position of the buyer to act on the belief that he acquires or has acquired a good title to the goods, and so causes the buyer to alter his previous legal position (*i*).

Factors;

(3) Sales by factors and mercantile agents (*k*);

Sellers and buyers in possession;

(4) Sales by persons who remain in possession of goods, or of the documents of title to goods, which they have previously sold to another; or by a person who has bought or agreed to buy goods and has obtained possession of the goods or the documents of title thereto (*l*);

Power of sale;

(5) Where a person, who is not the owner of goods, sells them under a common law or statutory power of sale, or under the order of a court of competent jurisdiction (*m*);

Market overt.

(6) Sale in market overt (*n*), according to the usage of the market, to a buyer in good faith who does not know of the defect in the title of the seller (*o*).

(*h*) Sale of Goods Act, 1893, s. 21 (1).

(*i*) *Pickard* v. *Sears* (1837), 6 A. & E. 469; 45 R. R. 538; *Knights* v. *Wiffen* (1870), L. R. 5 Q. B. 660. See Pollock on Contracts, Chap. X.

(*k*) *Post*, Chap. IV. Sale of Goods Act, 1893, s. 21 (2a); Factors Act, 1889, s. 2.

(*l*) Sale of Goods Act, 1893, s. 25; Factors Act, 1889, ss. 8, 9, *post*, p. 97.

(*m*) Sale of Goods Act, 1893, s. 21 (2b). As to pawnee, see *ante*, p. 33; as to sheriff, see *post*, Chap. XVI; as to County Court bailiff, see *Goodlock* v. *Cousins*, [1897] 1 Q. B. 558; and *Crane* v. *Omerod*, [1903] 2 K. B. 37; as to master of ship, see notes to *The Gratitudine*, Tudor, L.C. Merc. Law. 34; as to innkeeper, see *ante*, p. 42; as to sale by order of the Court, see Ord. L., r. 2; Ord. LVII., r. 12.

(*n*) As to markets by charter or prescription, see *Att.-Gen.* v. *Horner* (1883), 14 Q. B. D. 245; 11 App. Cas. 66; *Goldsmid* v. *G. E. R.* (1884), 9 App. Cas. 927; and, as to statutory markets, *Manchester* v. *Lyons* (1882), 22 Ch. D. 287; *Abergavenny* v. *Straker* (1889), 42 Ch. D. 83.

(*o*) Sale of Goods Act, 1893, s. 22.

Blackstone says (*p*) :—

"Market overt (that is 'open') in the country is only held on the special days provided for particular towns by charter or prescription (*q*); but in London [*i.e.*, the City of London] every day, except Sunday, is market day. The market place, or spot of ground set apart by custom for the sale of particular goods, is also in the country the only market; but in [the City of] London every shop (*r*) in which goods are exposed publicly (*s*) to sale, is market overt for such things only as the owner professes to trade in (*t*). But if my goods are stolen from me and sold out of market overt, my property is not altered, and I may take them wherever I find them. . . . And even in market overt, if the goods be the property of the king, such sale (though regular in all other respects) will in no case bind him, though it binds infants, femes coverts, idiots or lunatics, and men beyond sea or in prison; or if the goods be stolen from a common person and then taken by the king's officer from the felon and sold in open market; still, if the owner has used due diligence in prosecuting the thief to conviction, he loses not his property in the goods. So likewise if the buyer knoweth the property not to be in the seller, or there be any other fraud in the transaction; if he knoweth the seller to be an infant, or feme covert, not usually trading for herself; if the sale be not originally and wholly made in a fair or market, or not at the usual hours, the owner's property is not bound thereby (*u*). If a man buys his own goods in a fair or market, the contract of sale shall not bind him so that he shall render the price, unless the property had been previously altered by a former sale. And, notwithstanding any number of intervening sales, if the original vendor, who sold without having the property, comes again into possession of the goods, the original owner may take them when found in his hands who was guilty of the first breach of justice. By which wise regulations the common law has secured the right of the proprietor in personal chattels from being divested so far as was consistent with that other necessary policy; that purchasers *bona fide*,

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(*p*) 2 Bl. 449. See 2nd Instit. 713; and *Clayton* v. *Le Roy*, [1911] 2 K. B. 1031.

(*q*) This does not apply to a market recently established under a local Act: *Moyce* v. *Newington* (1878), 4 Q. B. D. 34.

(*r*) Including warehouses: *Lyons* v. *De Pass* (1840), 11 A. & E. 326; but not wharves; *Wilkinson* v. *King* (1809), 2 Camp. 335.

(*s*) *Lyons* v. *De Pass*, *sup.* A sale in a back room or upstairs showroom is not in market overt: *Hargreave* v. *Spink*, [1892] 1 Q. B. 25.

(*t*) *Case of Market Overt* (1596), 5 Rep. 83*b*; Tudor, L. C. Merc. Law, 274; Com. Dig. Market, E. Whether a sale *to* the shopkeeper is protected is doubtful: *Hargreave* v. *Spink*, *sup.*

(*u*) A sale by sample has not the privilege of market overt: *Crane* v. *London Dock Co.* (1864), 5 B. & S. 313.

in a fair, open and regular manner, should not be afterwards put to difficulties by reason of the previous knavery of the seller."

Stolen goods.

In the case of stolen goods, notwithstanding the sale was in market overt, the property will, by virtue of the Larceny Acts, 1861 and 1916 (*x*), and the Sale of Goods Act, 1893 (*y*), re-vest in the true owner upon his prosecuting the thief to conviction, and at the date of conviction (*z*), so that the goods must be restored even by a *bona fide* purchaser for value. If stolen goods are sold otherwise than in market overt, the true owner can recover them from an innocent purchaser without prosecuting the thief (*a*).

Larceny Act, 1916.

The Larceny Act, 1916 (*b*), provides that—

Conviction of offender.

"If any person guilty of any such felony or misdemeanour as is mentioned in this Act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence by or on behalf of the owner of the property, and convicted thereof, the property shall be restored to the owner or his representative"; and further, that in every such case the Court before whom such person is tried "shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner."

Summary conviction.

If the offence is indictable, a conviction in a court of summary jurisdiction has the same effect as a conviction on indictment, and a like order for restitution may be made (*c*).

Property re-vests.

It was held that on conviction the property in the goods or other property re-vested in the true owner, even if no writ of restitution was awarded, and he could sue

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(*x*) 24 & 25 Vict. c. 96, s. 100; repealed and re-enacted by Larceny Act, 1916, s. 45.

(*y*) S. 24 (1).

(*z*) *Lindsay* v. *Cundy* (1876), 1 Q. B. D. 348.

(*a*) *White* v. *Spettigue* (1845), 13 M. & W. 603; *Lee* v. *Bayes* (1856), 18 C. B. 599; *Wells* v. *Abrahams* (1872), L. R. 7 Q. B. 554.

(*b*) 6 & 7 Geo. 5, c. 50, s. 45; replacing s. 100 of the Larceny Act, 1861.

(*c*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 27 (3).

the purchaser for trover (*d*). Now, by the Sale of Goods Act, 1893 (*e*), it is enacted that "where *goods* have been stolen, and the offender is prosecuted to conviction, the property in the *goods* so stolen re-vests in the person who was the owner of the goods, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise." "Goods," in this Act, include all chattels personal *except* choses in action and money (*f*).

Appeal against conviction.

By the Criminal Appeal Act, 1907, the operation of any order for restitution after conviction on indictment, and the operation of sect. 24 (1) of the Sale of Goods Act, 1893, after such a conviction, is suspended, unless the Court directs to the contrary, for ten days or until the hearing of an appeal; and if the conviction is quashed the order, or provisions of the Sale of Goods Act, do not take effect. The Court of Criminal Appeal may annul or vary any such order, although the conviction is not quashed (*g*).

These provisions do not affect the title of a *bona fide* purchaser in cases which come within sects. 1, 2, and 8 of the Factors Act, 1889, and sect. 25 of the Sale of Goods Act, 1893 (*h*).

When goods have been *stolen*.

Sale of Goods Act, 1893.

Under the Larceny Act, 1861, the property re-vested, even if the owner, being induced by fraud, had parted with his goods under a contract of sale, which passed the property to the purchaser (*i*). This has been altered by the Sale of Goods Act, 1893, which provides that "where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not re-vest in the person who was the owner of the goods by reason only of the conviction of the offender" (*k*). It must be observed that, in the

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(*d*) *Scattergood* v. *Silvester* (1850), 15 Q. B. 506.

(*e*) S. 24 (1). See *Payne* v. *Wilson*, [1895] 1 Q. B. 653; 2 *Id.* 537.

(*f*) S. 62.

(*g*) 7 Edw. 7, c. 23, s. 6.

(*h*) See *Payne* v. *Wilson*, *sup.*

(*i*) *Vilmont* v. *Bentley* (1886), 12 App. Cas. 471, overruling *Moyce* v. *Newington*, *sup.*

(*k*) S. 24 (2).

case of goods obtained otherwise than by larceny, the Sale of Goods Act does not expressly take away the power of the Court to order restitution, and it would seem that this power still remains.

By the proviso to sect. 45 of the Larceny Act, 1916, a valuable security which has been *bona fide* paid or discharged by the person liable, or a negotiable instrument which has been *bona fide* transferred for value to a person not having notice of the felony or misdemeanour, does not re-vest, and cannot be ordered to be restored (*l*).

Sale under voidable title.

Where, however, the seller has a *voidable* title, as where he has obtained the goods by fraud not coming within the definition of larceny, and his title has not been avoided at the time of the sale, the buyer acquires a good title if he buys in good faith and without notice of the seller's defect of title (*m*).

Sale of horses.

Special statutory provisions (*n*) were made as far back as the Tudor period for the protection of owners of horses in case of sale, by which the passing of the property in them, notwithstanding sale in market overt (*o*), is still regulated. The reasons for, and nature of, such provisions are thus given by Blackstone (*p*) :—

> "A horse is so fleet an animal that the stealers of them may flee far off in a short space, and be out of the reach of the most industrious owner. All persons, therefore, that have occasion to deal in horses, and are therefore liable sometimes to buy stolen ones, would do well to observe, that whatever price they may give, or how long soever they may keep possession before it be claimed, they gain no property in a horse that has been stolen, unless it be bought in a fair or market overt; nor even then unless the directions be pursued that are laid down in the statutes 2 P. & M. c. 7, and 31 Eliz. c. 12, by which it is enacted that every horse, so to be sold, shall be openly exposed, in the time of such fair or market, for one whole hour together, between ten in the morning and sunset in the open and public place used for such sales, and not in

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(*l*) *Chichester* v. *Hill* (1882), 52 L. J. Q. B. 160.

(*m*) Sale of Goods Act, 1893, s. 23; *Whitehorn* v. *Davison*, [1911] 1 K. B. 463; *Folkes* v. *King*, [1923] 1 K. B. 282; cf. *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459; *Heap* v. *Motorists' Advisory Agency*, [1923] 1 K. B. 577.

(*n*) 2 & 3 Ph. & M. c. 7 (1555), and 31 Eliz. c. 12 (1589).

(*o*) Sale of Goods Act, 1893, s. 22 (2).

(*p*) 2 Bl. 450.

any private yard or stable: that the horse shall be brought by both the vendor and vendee to the toll-gatherer or book-keeper of such fair or market: that toll be paid if any be due; and if not, one penny to the book-keeper, who shall enter down the price, colour, and marks of the horse, with the names, additions, and abode of the vendee and the vendor; the latter, either upon his own knowledge, or the testimony of some credible witness. And, even if all these points be fully complied with, yet such sale shall not take away the property of the owner, if within six months after the horse is stolen he puts in his claim before the mayor, or some justice, of the district in which the horse shall be found; and within forty days after that, proves such his property by the oath of two witnesses before such mayor or justice; and also tenders to the person in possession such price as he *bona fide* paid for him in market overt. But in case any one of the points before mentioned be omitted or not observed in the sale, such sale is utterly void; and the owner shall not lose his property, but at any distance of time may seize, or bring an action for, his horse wherever he happens to find him."

Transfer of property in chattel.

Gift.

We have already said that transfer of possession operates to transfer the ownership where that is the intention (*q*). Where there is no consideration, that is, in cases of gift, this is the only manner in which a transfer of the property in a chattel capable of delivery can be made *at law* otherwise than by deed (*r*). But under a contract of sale the property in goods may in certain circumstances pass to the buyer without delivery or deed.

Contract of sale.

Definition

A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price (*s*). There may be a contract for sale between one part owner and another (*s*). A "contract of sale" includes an agreement to sell as well as a sale (*t*). A contract of sale may be absolute or conditional (*u*).

"Sale."

Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the

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(*q*) *Ante*, p. 51.
(*r*) *Post*, Chap. V.
(*s*) Sale of Goods Act, 1893, s. 1 (1).
(*t*) S. 62 (1).
(*u*) S. 1 (2).

"Agreement to sell."

property in the goods is to take place at a future time, or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell (*x*). "An agreement to sell" becomes a "sale" when the time elapses, or the conditions are fulfilled subject to which the property in the goods is to be transferred (*y*).

The expressions, in this definition, "sale" and "agreement to sell," correspond to the distinction between "executed" and "executory contracts." By an executed contract of sale the property passes at the instant when the contract is made; by an executory contract the property does not pass until some condition is satisfied (*z*). Where the contract is executed and passes the property in the goods, it operates as a conveyance, and is called a "bargain and sale" (*a*).

Judge Chalmers says (*b*) :—

> "It is important to distinguish clearly between the two classes of contracts. An agreement to sell, or, as it is often called, an executory contract of sale, is a contract pure and simple; whereas a sale, or, as it is called for distinction, an executed contract of sale, is a contract *plus* a conveyance. By an agreement to sell a *jus in personam* is created, by a sale a *jus in rem* is transferred. Where goods have been sold, and the buyer makes default, the seller may sue for the contract price, but where an agreement to buy is broken, the seller's remedy is an action for unliquidated damages. If an agreement to sell be broken by the seller, the buyer has only a personal remedy against the seller. The goods are still the property of the seller, and he can dispose of them as he likes; they may be taken in execution for his debts, and, if he becomes bankrupt, they pass to his trustee, who may disclaim the contract. But if there has been a sale, and the seller breaks his engagement to deliver the goods, the buyer has not only a personal remedy against the seller, but also the usual proprietary remedies in respect of the goods themselves, such as actions for conversion and detinue. In many cases, too, he can follow the goods into the hands of third parties. Again, if there be an agreement for sale, and the goods are destroyed, the loss, as a rule, falls on the seller, while, if there has been a sale, the loss, as a rule, falls upon the buyer, though the goods have never come into his possession."

(*x*) S. 1 (3).
(*y*) S. 1 (4).
(*z*) *Post*, p. 60.
(*a*) Shep. Touch. 221.
(*b*) Chalmers, Sale of Goods Act, 1893 (ed. 10), p. 9.

When the property passes. Unascertained goods.

Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained (*c*). Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred (*d*). To ascertain the intention of the parties, the terms of the contract, the conduct of the parties, and the circumstances of the case must be considered (*e*).

Specific or ascertained goods. Intention of parties.

"Specific" and "future" goods.

"Specific goods" are goods identified and agreed upon at the time a contract of sale is made (*f*). "Future goods" are goods to be manufactured or acquired by the seller after the making of the contract of sale (*g*). Goods are in a "deliverable state" when they are in such a state that the buyer would, under the contract, be bound to take delivery of them (*h*).

"Deliverable state."

Unless a different intention appears (*i*), the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:—

Rules for ascertaining intention.

(1) Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial

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(*c*) Act of 1893, s. 16; *Dixon* v. *Yates* (1833), 5 B. & Ad. 340.

(*d*) S. 17 (1); *Seath* v. *Moore* (1886), 11 App. Cas. 350, 370, 380; *Shepherd* v. *Harrison* (1871), L. R. 5 H. L. 127; *McEntire* v. *Crossley*, [1895] A. C. 463; *Reid* v. *Macbeth*, [1904] A. C. 223; *Weiner* v. *Gill*, [1906] 2 K. B. 574; *Saks* v. *Tilley* (1915), 32 T. L. R. 148; *Kempler* v. *Bravingtons, Lim.*, [1925] W. N. 158; 41 T. L. R. 414, 519.

(*e*) S. 17 (2); *Ogg* v. *Shuter* (1875), L. R. 10 C. P. 162; *Young* v. *Matthews* (1866), L. R. 2 C. P. 127.

(*f*) S. 62 (1).

(*g*) S. 62 (1); s. 5. *Watts* v. *Friend* (1830), 10 B. & C. 446; 34 R. R. 477; *Hibblewhite* v. *M'Morine* (1839), 5 M. & W. 462; 55 R. R. 578.

(*h*) S. 62 (4). *Denny* v. *Skelton* (1916), 86 L. J. K. B. 280; *Underwood, Ltd.* v. *Burgh Castle Syndicate*, [1922] 1 K. B. 343.

(*i*) S. 18. *Calcutta Co.* v. *De Mattos* (1863), 32 L. J. Q. B. 339; *Furley* v. *Bates* (1863), 33 L. J. Ex. 53; *Reid* v. *Macbeth*, *sup.*; *Laing* v. *Barclay*, [1908] A. C. 35; *Weiner* v. *Gill*, *sup.*; *Kempler* v. *Bravingtons*, *sup.*

whether the time of payment, or the time of delivery, or both, be postponed (*k*).

(2) Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing be done and the buyer has notice thereof (*l*).

(3) Where there is a contract for the sale of specific goods in a deliverable state, but the *seller* is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof (*m*).

"Sale or return."

(4) When goods are delivered to the buyer on approval, or "on sale or return," or other similar terms, the property passes to the buyer :—(i) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction (*n*); (ii) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact (*o*).

(*k*) S. 18, rule 1. *Tarling* v. *Baxter* (1827), 6 B. & C. 360; 30 R. R. 355; Tudor, Merc. Cases, 308.

(*l*) S. 18, rule 2. *Clarke* v. *Spence* (1836), 4 A. & E. 466; 43 R. R. 395; *Rugg* v. *Minett* (1809), 11 East, 210; 10 R. R. 475; *Acraman* v. *Morrice* (1875), 8 C. B. 449.

(*m*) S. 18, rule 3. *Furley* v. *Bates*, *sup.*; *Hanson* v. *Meyer* (1805), 6 East, 614; 8 R. R. 572; *Simmons* v. *Swift* (1826), 5 B. & C. 857; 29 R. R. 438.

(*n*) S. 18, rule 4 (a); *Kirkham* v. *Attenborough*, [1897] 1 Q. B. 201, if the buyer pledges the goods. Cf. *Weiner* v. *Gill*, *sup.*; *Kempler* v. *Bravingtons, Lim.*, *sup.*

(*o*) S. 18, rule 4 (b); *Moss* v. *Sweet* (1851), 16 Q. B. 493; *Ray* v. *Barker* (1879), 4 Ex. D. 279; *Elphick* v. *Barnes* (1880), 5 C. P. D 321.

Unascertained or future goods sold by description.

(5) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, by either party, with the assent of the other, the property in the goods thereupon passes to the buyer (*p*). Such assent may be express or implied, and may be given after the appropriation is made (*q*). Where, in pursuance of the contract, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he does unconditionally appropriate the goods to the contract (*r*).

In cases of this nature, when the seller makes the appropriation pursuant to authority from the buyer, a difficult question often arises whether the acts done by the seller show a revocable or a final intention to appropriate.

Reservation of right of disposal.

Where specific or subsequently ascertained goods are sold, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled (*s*). In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled (*t*). Where goods are shipped, and

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(*p*) S. 18, rule 5 (1); *Heilbutt* v. *Hickson* (1872), L. R. 7 C. P. 449; *Jenner* v. *Smith* (1869), L. R. 4 C. P. 270; *Aldridge* v. *Johnson* (1857), 7 E. & B. 885; *Pritchett and Gold* v. *Currie*, [1916] 2 Ch. 515.

(*q*) *Campbell* v. *Mersey Docks* (1863), 14 C. B. (N.S.) 412.

(*r*) S. 18, rule 5 (2); *Wait* v. *Baker* (1848), 2 Ex. 7; *Joyce* v. *Swann* (1864), 17 C. B. (N.S.) 102; *Pignataro* v. *Gilroy*, [1919] 1 K. B. 459.

(*s*) S. 19 (1); *Mirabita* v. *Imperial Ottoman Bank* (1878), 3 Ex. D. 164; *Brandt* v. *Bowlby* (1831), 2 B. & Ad. 932; 36 R. R. 796, delivery to buyer; *Wait* v. *Baker*, *sup.*, delivery on board ship. See also *The Parchim*, [1918] A. C. 157.

(*t*) See cases cited in note (*s*).

by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller, *prima facie*, does reserve the right of disposal (*u*).

When the seller draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together, to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading, the property in the goods does not pass to him (*v*), though he may be able to give a good title to a *bona fide* purchaser (*x*).

Hire-purchase agreements.

Under a "hire-purchase" agreement, where goods are hired upon the terms that the hirer is to pay certain sums of money, and upon payment of all such sums the property in the goods is to pass to him, but until then is to remain in the lessor, the sale is conditional, and the property does not pass until all the money is paid (*y*).

Risk *prima facie* passes with property.

Unless the parties have otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer; but where the property is transferred, the goods are at the buyer's risk whether delivery has been made or not (*z*). If, however, delivery has been delayed through the fault of either party, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault (*a*). The duties or liabilities of the seller or buyer as bailee (*b*) of the goods are not affected by the above rules (*c*).

(*u*) S. 19 (2); *Ogg* v. *Shuter*, *sup.* See s. 43 (1) (a).

(*v*) S. 19 (3). *Shepherd* v. *Harrison* (1871), L. R. 5 H. L. 116, 133.

(*x*) S. 25 (2). *Cahn* v. *Pockett's Co.*, [1899] 1 Q. B. 643.

(*y*) See *Ex p. Crawcour* (1878), 9 Ch. D. 419; *Lee* v. *Butler*, [1893] 2 Q. B. 318; *Helby* v. *Matthews*, [1895] A. C. 471; cf. *Whiteley, Lim.* v. *Hilt*, [1918] 2 K. B. 808.

(*z*) Sale of Goods Act, 1893, s. 20. See *Tarling* v. *Baxter*, *sup.*; *Elphick* v. *Barnes*, *sup.*; *Sweeting* v. *Turner* (1871), L. R. 7 Q. B. 310.

(*a*) S. 20. See *Martineau* v. *Kitching* (1872), L. R. 7 Q. B. 454, 456.

(*b*) See *post*, pp 68, 69.

(*c*) S. 20.

Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of either party, perish before the risk passes to the buyer, the agreement is thereby avoided (*d*). This rule applies to specifically described goods, whether in existence at the time the contract is made or not (*e*).

Formalities of the contract.

Subject to the provisions of the Sale of Goods Act, 1893 (*f*), and of any other statute (*g*), a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in either way, or may be implied from the conduct of the parties (*h*). The law relating to corporations is not, however, affected by this rule (*i*).

Contract for sale for £10 or upwards.

Statute of Frauds, s. 17.

It was provided by the Statute of Frauds (*k*) that :—

> "No contract for the sale of any goods, wares, and merchandises, for the price of £10 sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged with such contract, or their agents thereunto lawfully authorized."

Lord Tenterden's Act, s. 7.

A question having arisen whether the statute applied to contracts for the sale of goods not at the time capable of being delivered, it was provided by Lord Tenterden's Act (*l*), in 1828, that :—

> "The said enactment [s. 17 of the Statute of Frauds] shall extend to all contracts for the sale of goods of the *value* of £10 sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

(*d*) S. 7.

(*e*) See *Howell* v. *Coupland* (1874), L. R. 9 Q. B. 462; 1 Q. B. D. 258; cf. *Lebeaupin* v. *Crispin*, [1920] 2 K. B. 714.

(*f*) S. 3.

(*g*) See Merchant Shipping Act, 1894, ss. 24, 26, 65, as to sale of ships, *post*, Chap. VII.

(*h*) *Brogden* v. *Metrop. R. Co.* (1877), 2 App. Cas. 666.

(*i*) Sale of Goods Act, 1893, s. 3.

(*k*) 29 Car. 2, c. 3, s. 17.

(*l*) 9 Geo. 4, c. 14, s. 7.

Sale of Goods Act, 1893, s. 4.

Both these enactments are now repealed by the Sale of Goods Act, 1893 (*m*), and the following provisions are substituted (*n*) :—

> " (1) A contract for the sale of any goods of the value of £10 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf (*o*).
>
> " (2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery (*p*).
>
> " (3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not " (*q*).

" Price."
" Value."

In sect. 17 of the Statute of Frauds the words were " price " of £10, but in sect. 7 of Lord Tenterden's Act, the words were " value " of £10, and it was decided that the effect of the latter enactment was to substitute " value " for " price " in sect. 17 of the Statute of Frauds (*r*). The word " value " is therefore used in the present Act.

Contract not void, but only unenforceable.

In the Statute of Frauds it was provided that the contract should not " be allowed to be good," and it was decided that this did not render the contract void or illegal, but only unenforceable, unless its existence could be proved in one of the alternative manners provided by the Act (*s*). The present Act gives effect to these decisions, and provides that the contract " shall not be enforceable by action " (*t*).

(*m*) S. 60. (*n*) S. 4. (*o*) S. 4 (1). (*p*) S. 4 (2).
(*q*) S. 4 (3).
(*r*) *Harman* v. *Reeve* (1856), 18 C. B. 587.
(*s*) *Maddison* v. *Alderson* (1883), 8 App. Cas. 488.
(*t*) *Taylor* v. *G. E. R.*, [1901] 1 K. B. 774.

Signature by "party to be charged."

In the Act of 1893 the words "party to be charged or his agent" have been substituted for the words "parties to be charged . . . or their agents" in the Statute of Frauds; for it was always held to be sufficient if the note or memorandum was signed by the party against whom the contract was sought to be enforced (*u*).

"Goods."

"Goods," in the Act of 1893 (*x*), include all chattels personal, other than things in action and money (*y*); emblements (*z*); industrial growing crops (*z*); and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale (*a*).

Distinction between contract to do work, and of sale.

The provisions of sect. 4 of the Act of 1893 apply only to a contract of *sale*, and a contract of sale of goods must be carefully distinguished from other similar contracts. If a man purchases from a tailor a coat which the tailor has to make from his own materials, the contract is clearly an executory contract of sale; if a man employs a tailor to make a coat from his (the employer's) materials, the contract is clearly one to do work and not one of sale. There are, however, some intermediate cases where the person who does the work also supplies the materials; such cases present great difficulty. If a man employs a printer to print a book, the printer finding the materials, or a solicitor to draw a deed on parchment belonging to the solicitor, it would be an abuse of language to call such a contract a contract of sale (*b*); for neither the book nor the deed, when completed, becomes the property of the printer or solicitor; the employer has such a property in the book or deed

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(*u*) See *Reuss* v. *Picksley* (1866), L. R. 1 Ex. 342.

(*x*) S. 62 (1).

(*y*) See *Humble* v. *Mitchell* (1839), 11 A. & E. 205; 52 R. R. 318; *Colonial Bank* v. *Whinney* (1886), 11 App. Cas. 426.

(*z*) *Marshall* v. *Green* (1875), 1 C. P. D. 35.

(*a*) See *Lavery* v. *Pursell* (1888), 39 Ch. D. 508; *Marshall* v. *Green*, *sup.*; *Morgan* v. *Russell*, [1909] 1 K. B. 357. Unsevered "tenant's fixtures" are not "goods"; *Lee* v. *Gaskell* (1876), 1 Q. B. D. 700.

(*b*) *Clay* v. *Yates* (1856), 1 H. & N. 73.

as would entitle him to restrain the printer or solicitor from selling it to another. Probably, in cases of this nature, the question whether the contract is one of sale or for work and materials depends upon whether the employer already has some proprietary interest in the thing to be made or supplied. If he has, the contract is one to do work, and, if he has not, is one of sale (*c*). A contract to make and attach a thing to land, or to an existing chattel, belonging to the employer, is a contract for work and materials, and not a contract of sale (*d*).

Exchange or barter.

Where the consideration for the transfer of the property in goods from one person to another consists of other goods, the contract is not one of sale, but of exchange or barter (*e*); but if the consideration consists partly of goods and partly of money, it seems that the contract is one of sale (*f*).

On reference to the statute (*g*) it will be observed that there are three alternative ways in which the contract may be evidenced :—

1. Acceptance and actual receipt.

(1) The first alternative is that " the buyer shall accept part of the goods so sold, and actually receive the same " (*g*).

This is explained to be " a delivery of possession under the contract for sale " (*h*).

Acceptance and actual receipt do not preclude the buyer from questioning the quantity or quality of the goods, or from disputing the fact of the performance of the contract by the seller (*i*); they merely supply the want of a written memorandum of the contract.

Acceptance and receipt were sometimes confused in

(*c*) *Lee* v. *Griffin* (1861), 30 L. J. Q. B. 252; 1 L. Q. R., p. 8.

(*d*) *Clark* v. *Bulmer* (1843), 11 M. & W. 243; *Anglo-Egyptian Co.* v. *Rennie* (1875), L. R. 10 C. P. 271.

(*e*) *Harrison* v. *Luke* (1845), 14 M. & W. 139.

(*f*) *Aldridge* v. *Johnson* (1857), 26 L. J. Q. B. 296; *Sheldon* v. *Cox* (1824), 3 B. & C. 420.

(*g*) Sale of Goods Act, 1893, s. 4 (1).

(*h*) Pollock and Wright, 71.

(*i*) *Morton* v. *Tibbett* (1850), 15 Q. B. 428; *Page* v. *Morgan* (1885), 15 Q. B. D. 228; *Taylor* v. *Smith*, [1893] 2 Q. B. 65.

the earlier cases (*k*), but they must be distinguished. Receipt of the goods by the buyer may be evidence of his intention to accept, but is not acceptance. There may be acceptance without receipt, or receipt without acceptance; both acceptance and receipt must be proved in order to bring a case within this alternative.

Acceptance.

An acceptance of goods within this section is when "the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale" (*l*), whether the goods have been accepted in performance of the contract or not (*l*).

"Acceptance" is here defined only for the purposes of this section, and is a different thing from the acceptance which binds a purchaser to pay for goods (*m*).

Instances of acts which amount to an "acceptance" for this purpose are:—Comparing the goods with a sample (*n*); taking samples from the bulk after the contract (*o*); selling, or offering to sell, the goods to a sub-purchaser (*p*); keeping and dealing with a delivery order (*q*), or bill of lading (*r*), sent to the buyer by the seller.

"Actual receipt."

With regard to "actual receipt," it is important to remember that, as in the case of acceptance, actual receipt is only evidence of the existence of the contract; it does not prove that the seller has performed his part of the contract.

The question as to what amounts to actual receipt is not free from difficulty, and it depends in part upon

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(*k*) *Castle* v. *Sworder* (1860), 6 H. & N. 828; *Marvin* v. *Wallis* (1856), 6 E. & B. 726.

(*l*) Act of 1893, s. 4 (3); *Abbott* v. *Wolsey*, [1895] 2 Q. B. 97; *Taylor* v. *G. E. R.*, [1901] 1 K. B. 774.

(*m*) *Abbott* v. *Wolsey*, [1895] 2 Q. B. 100. See s. 35 of the Act of 1893.

(*n*) *Page* v. *Morgan*, *sup.*; *Abbott* v. *Wolsey*, *sup.*

(*o*) *Gardner* v. *Grout* (1857), 2 C. B. (N.S.) 340.

(*p*) *Chaplin* v. *Rogers* (1800), 1 East, 192; 6 R. R. 249; *Blenkinsop* v. *Clayton* (1817), 7 Taunt. 597; 18 R. R. 602; *Taylor* v. *G. E. R.*, *sup.*

(*q*) *Farina* v. *Home* (1846), 16 M. & W. 119.

(*r*) *Currie* v. *Anderson* (1860), 2 E. & E. 592.

Goods in possession of seller.

the question in whose possession the goods are at the time of the contract of sale. They may be—(1) in the possession of the seller, or (2) in the possession of some person as his agent or bailee, who may be either a stranger or the buyer himself.

Change of possession.

It will be found in all cases of "actual receipt" that either the possession of part of the goods is changed, or, if this is not the case, that the character of the possession is changed.

First. Suppose the goods to be in the possession of the seller.

In this case, if the buyer removes any part of the goods by virtue of the contract, he has "actually received" them.

Delivery to carrier.

Where the seller delivers goods to a common carrier for conveyance to the buyer, they pass out of the seller's possession, but do not pass into the possession of the buyer, and yet, by an anomaly, the delivery to the carrier is considered as "actual receipt" by the buyer. In other words, the common carrier is considered as the agent of the buyer for the purpose of receiving, though not of accepting, the goods (*s*); and, on goods being delivered to the carrier, he becomes the bailee of the buyer, not of the seller.

Change of character of possession.

If the seller agrees with the buyer that he will hold the goods for him, this changes the character of the possession of the seller, so that he becomes the bailee of the buyer, and amounts to actual receipt by the buyer (*t*).

Goods in possession of third person.

Secondly. Where, at the time of the sale, the goods are in the possession of a third person as bailee for the seller. In this case, the agreement of the seller and buyer, with the assent of the bailee, that the bailee shall hold the goods for the buyer, operates as an "actual

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(*s*) *Hart* v. *Bush* (1858), E. B. & E. 494; *Hunt* v. *Hecht* (1853), 8 Ex. 814; *Smith* v. *Hudson* (1865), 6 B. & S. 431; *Norman* v. *Phillips* (1845), 14 M. & W. 277.

(*t*) *Elmore* v. *Stone* (1809), 1 Taunt. 458; *Marvin* v. *Wallis* (1856), 6 E. & B. 726; *Cusack* v. *Robinson* (1861), 1 B. & S. 299.

receipt" by the buyer. All three parties must concur in the agreement (*u*). No change of possession takes place; it remains with the bailee; but the character of his possession is changed; he was bailee for the seller, he becomes bailee for the buyer. But the mere giving of a delivery order to the buyer by the seller does not operate as an "actual receipt" by the buyer until it has been assented to by the bailee (*u*).

Buyer in possession as bailee.

Thirdly. The goods may, at the time of the contract of sale, be in the possession of the buyer as bailee of the seller.

In this case there can be no change of possession, but the character of the possession may be changed; instead of holding the goods as bailee of the seller, the buyer may hold them as owner, and this will amount to an "actual receipt" by him. Evidence of acts of the buyer which are inconsistent with his holding the goods as bailee is sufficient to show that the character of his possession is changed (*x*).

Acceptance and receipt need not be contemporaneous.

Acceptance and actual receipt need not be contemporaneous. Acceptance may precede or follow the receipt. If the buyer resells the goods before the seller has parted with them or agreed to hold as bailee for the buyer, the acceptance necessarily precedes the receipt; if the seller dispatches them by a common carrier before acceptance by the buyer, the receipt necessarily precedes the acceptance; and, lastly, in the case of the buyer selecting goods in a shop, buying them and taking them away with him, acceptance and receipt are contemporaneous (*y*).

2. Earnest or part payment.

(2) The second alternative is giving "something in earnest to bind the contract or in part payment."

Earnest and part payment are often confounded, but they are of totally different natures. Payment, and

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(*u*) *Farina* v. *Home* (1846), 16 M. & W. 119; *Godts* v. *Rose* (1855), 17 C. B. 229.

(*x*) *Edan* v. *Dudfield* (1841), 1 Q. B. 302.

(*y*) *Cusack* v. *Robinson*, *sup.*

therefore part payment, cannot be made until the contract is concluded, while earnest is given for the purpose of binding the contract. In other words, payment is made after the contract; earnest is given simultaneously with the conclusion of the contract. Part payment is part of the price, earnest is not, as a rule, part of the price (*z*); payment must be in money; earnest need not be money (*z*).

It may, perhaps, be necessary to point out that, as the buyer must "give" the earnest, merely stroking the hand of the seller with a shilling and not giving it him is not sufficient (*a*).

Part payment by set-off.

Sometimes it is intended that a debt due from the seller to the buyer should be set off against the price and operate as part payment, and the question then arises whether this is part payment within the section. It appears to be established that if the agreement for set-off is part of the contract for sale which it is wished to prove, the set-off is not part payment within the section; but that, on the other hand, if the agreement for a set-off is made independently of the contract of sale, it may operate as part payment within the section (*b*).

3. Note or memorandum.

(3) The third alternative is that "some note or memorandum in writing of the contract be made and signed by the party to be charged, or his agent in that behalf."

What it must contain.

The note or memorandum must contain all the essential terms of the contract (*c*). It must describe the parties by name or other sufficient description (*d*), the goods sold (*e*), the price if it has been agreed (*f*), and any other express term of the contract (*g*).

(*z*) *Howe* v. *Smith* (1884), 27 Ch. D. 101.

(*a*) *Blenkinsop* v. *Clayton* (1817), 7 Taunt. 597; 18 R. R. 602.

(*b*) *Walker* v. *Nussey* (1847), 16 M. & W. 302; *Norton* v. *Davison*, [1899] 1 Q. B. 401.

(*c*) *Egerton* v. *Mathews* (1805), 6 East, 307; 8 R. R. 489.

(*d*) *Vandenbergh* v. *Spooner* (1866), L. R. 1 Ex. 316; *Allen* v. *Bennet* (1810), 3 Taunt. 167; 12 R. R. 633.

(*e*) *Thornton* v. *Kempster* (1814), 5 Taunt. 786; 15 R. R. 658; *Shardlow* v. *Cotterell* (1881), 20 Ch. D. 90.

(*f*) *Elmore* v. *Kingscote* (1826), 5 B. & C. 583; 29 R. R. 341; *Acebal* v. *Levy* (1834), 10 Bing. 376.

Price.

If no agreement has been come to as to the price of the goods, there is an implied agreement to pay what the goods are reasonably worth (*h*), but this need not be stated in the note or memorandum (*i*).

Distinction between written contract and "note."

There is an important distinction between a contract reduced into writing and signed by both parties, and a "note or memorandum" sufficient to satisfy the statute. In the first case evidence is not admissible to show that the contract is not that which is expressed in writing; in the latter case evidence is admissible to show that a document which seems to show a complete contract does not truly record the contract which was in fact made, or that no contract was in fact concluded (*k*). The statute is "a weapon of defence, not offence, and it does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties" (*l*).

Parol evidence.

It is hardly necessary to say that evidence of the circumstances of the parties to the contract is admissible for the purpose of ascertaining in what meanings they used the words in the note. This is part of the general law as to the interpretation of documents.

Variation of the contract.

Bearing in mind that, at common law, it is competent to the parties to a written contract, not under seal, to alter, vary, or revoke it by parol, it might be supposed that a similar rule applied to a contract evidenced by a note in writing under this section. But this is not the case; for, though the parties may revoke the contract by parol (*m*), they cannot vary it by parol (*n*); the reason apparently being that the only contract made

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(*g*) *Peirce* v. *Corf* (1874), L. R. 9 Q. B. 210; *M'Clean* v. *Nicolle* (1861), 9 W. R. 811 (as to quality).

(*h*) Sale of Goods Act, 1893, s. 8 (2).

(*i*) *Hoadly* v. *M'Laine* (1834), 10 Bing. 482.

(*k*) *Hussey* v. *Horne-Payne* (1879), 4 App. Cas. 320; *Bristol Co.* v. *Maggs* (1890), 44 Ch. D. 616; *Bellamy* v. *Debenham* (1890), 45 *id.* 493; *Pattle* v. *Hornibrook*, [1897] 1 Ch. 25.

(*l*) *Jervis* v. *Berridge* (1873), 8 Ch. 360, per Lord Selborne.

(*m*) *Goss* v. *Nugent* (1833), 5 B. & Ad. 58; *Morris* v. *Baron & Co.*, [1918] A. C. 1.

(*n*) *Noble* v. *Ward* (1867), L. R. 2 Ex. 135; cf. *Morris* v. *Baron & Co.*, *sup.*

enforceable by the note in writing is the contract of which that writing is a note, so that if the contract is varied by parol, the writing is no longer a note of the contract as varied, and therefore the written note does not show the contract as varied.

Note contained in several documents.

The note of the contract may be contained in several documents, and one only of such documents need be signed (*o*). The several documents must be annexed to each other, or the connection between them must appear upon the face of the documents (*o*). Parol evidence is not admissible for the purpose of connecting the documents (*o*); but it is admissible to identify a document referred to, or to show that a reference, which may be to a document, is in fact such a reference (*p*).

Signature.

It will be observed that the signature required is that of "the party to be charged or his agent in that behalf." The signature of the party seeking to enforce the contract is not necessary (*q*). The effect of this is somewhat curious. The contract can be enforced only against the person who has signed the note or memorandum, so that in effect the contract is or is not enforceable at the election of the party who does not sign (*r*).

Place and mode of signature.

The signature need not be at the end of the note or memorandum; it is sufficient if it is so introduced as to govern and authenticate every material or operative part of it (*s*). If the name appears in an unusual position, it is a question of fact in each case whether it was intended as a signature (*t*). Signature may be by print, mark, initials, or stamp (*u*).

(*o*) *Boydell* v. *Drummond* (1809), 11 East, 142; 10 R. R. 450; *Taylor* v. *Smith*, [1893] 2 Q. B. 65; *Pearce* v. *Gardner*, [1897] 1 Q. B. 688; *Lever* v. *Koffler*, [1901] 1 Ch. 543; *Birkmyr* v. *Darnell* (1704), 1 Sm. L. C. (ed. 13), 334.

(*p*) *Long* v. *Millar* (1879), 4 C. P. D. 450; *Oliver* v. *Hunting* (1890), 44 Ch. D. 205; *Taylor* v. *Smith*, *sup.* at p. 74.

(*q*) *Laythoarp* v. *Bryant* (1836), 2 Bing. N. C. 735.

(*r*) *Reuss* v. *Picksley* (1866), L. R. 1 Ex. 342.

(*s*) *Caton* v. *Caton* (1867), L. R. 2 H. L. 127; *Evans* v. *Hoare*, [1892] 1 Q. B. 593; *Re Hoyle*, [1893] 1 Ch. 84.

(*t*) *Durrell* v. *Evans* (1862), 1 H. & C. 174; *Sims* v. *Landray*, [1894] 2 Ch. 318.

(*u*) See notes to *Wain* v. *Warlters* (1804), 1 Sm. L. C. (ed. 13), 366.

When it must be made.

The note or memorandum need not be contemporaneous with the contract, but may be signed either before or after the contract is concluded. For instance, it may be contained in a written proposal which is afterwards verbally accepted (*x*), or in the minutes of a meeting (*y*), or in a subsequent letter repudiating liability under the contract (*z*). It must, however, be in existence when an action upon the contract is *commenced* (*a*).

Immaterial to whom addressed, or for what purpose made.

It is immaterial for what purpose the note is made, or to whom it is addressed; any writing embodying the terms of a contract and signed by the person to be charged is sufficient (*b*). Thus, a recital in a will (*c*) or deed (*d*), a letter referring to an unsigned document (*e*), an affidavit made in other proceedings (*f*), or a letter written to a third person (*g*), may be sufficient.

By agent.

The authority of an agent to sign must be determined according to the ordinary rules of agency (*h*), but one party cannot be the agent of the other to sign for him (*i*). An auctioneer is the agent of both buyer and seller for the purpose of signing the contract (but not otherwise, apart from express agreement); and a memorandum signed by him, at the time of the sale (*k*), will bind both parties (*l*); an auctioneer's clerk also

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(*x*) *Reuss* v. *Picksley*, *sup.*; *Re New Eberhardt Co.* (1890), 43 Ch. D. 118.

(*y*) *Jones* v. *Victoria Co.* (1877), 2 Q. B. D. 314.

(*z*) *Bailey* v. *Sweeting* (1861), 9 C. B. (N.S.) 843; *Wilkinson* v. *Evans* (1866), L. R. 1 C. P. 407, 411; see *Cox* v. *Hoare* (1907), 95 L. T. 121; 96 *id.* 719.

(*a*) *Lucas* v. *Dixon* (1889), 22 Q. B. D. 357; *Re Hoyle*, *sup.*

(*b*) *Re Hoyle*, [1893] 1 Ch. 84, 98, 99.

(*c*) *Re Hoyle*, *sup.*

(*d*) *Re Holland*, [1902] 2 Ch. 360.

(*e*) *John Griffiths Corp.* v. *Humber*, [1899] 2 Q. B. 414.

(*f*) *Barkworth* v. *Young* (1856), 4 Drew. 1; see *Lucas* v. *Dixon*, *sup.*

(*g*) *Gibson* v. *Holland* (1866), L. R. 1 C. P. 1.

(*h*) See notes to *Wain* v. *Warlters* (1804), 1 Sm. L. C. (ed. 13), 366; *post*, Chap. IV.

(*i*) *Sharman* v. *Brandt* (1871), L. R. 6 Q. B. 720; *John Griffiths Corp.* v. *Humber*, *sup.*

(*k*) *Mews* v. *Carr* (1856), 1 H. & N. 484; *Bell* v. *Balls*, [1897] 1 Ch. 663; *Chaney* v. *Maclow*, [1929] 1 Ch. 461; *post*, p. 93.

(*l*) *White* v. *Proctor* (1811), 4 Taunt. 209; 13 R. R. 580.

may be, and very often is, the agent of the purchaser to sign his name (*m*).

Contracts not to be performed within one year.

Since executory contracts of sale are included within sect. 4 of the Sale of Goods Act, 1893, the operation of the following section of the Statute of Frauds must be very limited in regard to the sale of goods:—

Statute of Frauds, s. 4.

> "No action shall be brought . . . (5) upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized" (*n*);

but it will apply to a contract for the sale of goods not to be performed within a year, although there has been an acceptance and actual receipt of part of the goods (*o*).

"Where the agreement distinctly shows upon the face of it that the parties contemplated its performance to extend over a greater space of time than one year, the case is within the statute; but where the contract is such that the whole may be performed within a year, and there is no express stipulation to the contrary, the statute does not apply" (*p*). It has, however, been decided that where the whole of what has to be done by one party is intended to be performed within a year, the case is not within the statute (*q*).

Pleading.

It may be added that where in an action it is intended by either party to rely upon sect. 4 of the Sale of Goods Act, 1893, or on the Statute of Frauds, in answer to a

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(*m*) *Sims* v. *Landray*, [1894] 2 Ch. 318; *Bell* v. *Balls*, *sup.*

(*n*) 29 Car. 2, c. 3, s. 4. See notes to *Peter* v. *Compton* (1694), 1 Sm. L. C. (ed. 13), 350.

(*o*) *Prested Co.* v. *Garner*, [1910] 2 K. B. 776; [1911] 1 K. B. 425.

(*p*) *Souch* v. *Strawbridge* (1846), 2 C. B. 815, per Tindal, C.J.; see *McGregor* v. *McGregor* (1888), 21 Q. B. D. 424; *Smith* v. *Gold Coast Co.*, [1903] 1 K. B. 285, 538; *Hanau* v. *Ehrlich*, [1912] A. C. 39.

(*q*) *Donellan* v. *Read* (1832), 3 B. & Ad. 899; *Cherry* v. *Heming* (1849), 4 Ex. 631; *Miles* v. *New Zealand Co.* (1886), 32 Ch. D. 266; *Milsom* v. *Stafford* (1899), 80 L. T. 590; *Reeve* v. *Jennings*, [1910] 2 K. B. 522, where it was held that such an intention did not appear.

claim, he must raise such matter by his pleading in the High Court (*r*), or by notice in the County Court (*s*); and a party will be estopped from raising this defence if he might have raised it in a previous action but neglected to do so (*t*).

§ 2. *Delivery—Seller's Lien—Stoppage in Transitu.*

Delivery.

Duties of seller and buyer.

It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract (*u*). Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods (*x*).

Place of delivery.

It depends upon the contract between the parties in each case, whether the buyer must take possession of the goods or the seller send them to the buyer (*y*). But apart from any contract, the place of delivery is the seller's place of business, if he have one, and, if not, his residence (*y*). If, however, the contract is in respect of specific goods, which are, to the knowledge of the parties, in some other place at the time of the contract, then that place is the place of delivery (*y*).

Time of delivery.

If the seller is bound to send the goods to the buyer, and no time is fixed, he must send them within a reasonable time (*z*). A demand or tender of delivery may be treated as ineffectual if made at an unreasonable hour (*a*).

(*r*) R. S. C., Ord. XIX., r. 15. See *Brunning* v. *Odhams* (1896), 75 L. T. 602.

(*s*) *Brutton* v. *Branson*, [1898] 2 Q. B. 219.

(*t*) *Humphries* v. *Humphries*, [1910] 1 K. B. 796; 2 *id.* 531.

(*u*) Sale of Goods Act, 1893, s. 27. Delivery is defined, s. 62 (1). See Pollock and Wright on Possession, 43.

(*x*) *Ib.* s. 28. See notes to *Cutter* v. *Powell* (1795), 2 Sm. L. C. (ed. 13), 11. See *Forrestt* v. *Aramayo* (1900), 83 L. T. 335; *Clemens Horst Co.* v. *Biddell*, [1912] A. C. 18.

(*y*) *Ib.* s. 29 (1).

(*z*) *Ib.* s. 29 (2).

(*a*) *Ib.* s. 29 (4).

Chap. III.

Goods in possession of third person.

Goods which are, at the time of sale, in the possession of a third person, are not delivered by the seller to the buyer until such person acknowledges to the buyer that he holds for him (*b*). This, however, is subject to the operation of the issue or transfer of any document of title to goods, such as a bill of lading (*b*).

Delivery to carrier.

If the seller is authorised or required to send the goods to the buyer, delivery to any carrier for the purpose of transmission to the buyer is *prima facie* a delivery to the buyer (*c*).

But, unless otherwise agreed, the seller must make such a contract with the carrier on the buyer's behalf as may be reasonable, and if he fails to do so, the buyer may refuse to treat the delivery to the carrier as delivery to himself, or may claim damages, if the goods be lost or damaged; and where sea transit is involved under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure, otherwise the goods will be deemed to be at the seller's risk (*d*).

F.o.b.

This arises in connection with contracts for sale of goods "f.o.b."—*i.e.*, "free on board." The letters f.o.b. signify that the cost of delivering the goods to the ship is to fall on the seller, the buyer paying the freight and arranging for insurance of the goods during transit.

C.i.f.

Another very usual form of mercantile contract for the sale and purchase of goods is what is known as a c.i.f. contract—*i.e.*, where the goods are purchased at a price covering the cost of the goods, the freight and the insurance, it being the duty of the seller to effect a proper insurance of the goods and to pay the freight on shipment (*e*).

(*b*) Sale of Goods Act, 1893, s. 29 (3); *Farina* v. *Home* (1846), 16 M. & W. 119; *Godts* v. *Rose* (1855), 17 C. B. 229.

(*c*) *Ib.* s. 32 (1).

(*d*) *Ib.* s. 32 (2) and (3). See *Wimble* v. *Rosenberg*, [1913] 3 K. B. 743.

(*e*) See *Manbre Saccharine Co.* v. *Corn Products Co.*, [1919] 1 K. B. 198; *Hansson* v. *Hamel & Horley, Lim.*, [1922] 2 A. C. 36.

In these cases the delivery of the requisite documents (*e.g.*, in the case of a c.i.f. contract, the shipping documents and the insurance policy) is equivalent to delivery of the goods, and the price becomes payable on delivery or tender of the documents, assuming that these are in order (*e*).

Indeed, it has been held that where the seller failed to make a proper tender of the documents he could not discharge his obligation under the contract by making a tender of the goods, which had arrived in the meantime (*ee*).

If the seller delivers the goods to the buyer without receiving payment, and without reserving the right of disposal, he has no further rights over the goods, and his only remedy is to bring an action for the price.

Unpaid seller's lien.

Notwithstanding that the property in the goods may have passed to the buyer, an unpaid seller, who is in possession of the goods, has a lien on the goods, or a right to retain them for the price while he is in possession of them until payment or tender of the price, in the following cases :—(1) where there is no stipulation as to credit; (2) where the goods are sold on credit, but the term of credit has expired; (3) where the buyer becomes insolvent (*f*).

In what cases.

Where seller agent or bailee for buyer.

The seller may exercise this right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer (*g*).

Where part delivery.

If part of the goods has been delivered, the unpaid seller may exercise his right of lien or retention on the remainder, unless the part delivery has been so made as to show an intention to waive the lien or right of retention (*h*).

Termination of lien.

The unpaid seller loses his lien, or right of retention, (1) when he delivers the goods to a carrier or other bailee

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(*ee*) *Orient Co.* v. *Brekke & Howlid*, [1913] 1 K. B. 531.

(*f*) Sale of Goods Act, 1893, ss. 39 (1), 41 (1). As to insolvency, see s. 62 (3), *post*, p. 78.

(*g*) *Ib.* s. 41 (2). See *Grice* v. *Richardson* (1877), 3 App. Cas. 319.

(*h*) *Ib.* s. 42. See *post*, p. 79.

for the purpose of transmission to the buyer without reserving the right of disposal (*i*) of the goods; (2) when the buyer or his agent lawfully obtains possession of the goods; (3) by waiver thereof (*k*).

This lien or right of retention is not lost by reason only that the seller has obtained judgment for the price of the goods (*l*).

Stoppage *in transitu.*

When the buyer of goods becomes insolvent, the unpaid seller who has parted with possession has the right of stopping the goods *in transitu*, that is to say, he may resume possession of the goods so long as they are in course of transit, and may retain them until payment or tender of the price (*m*). A person is "insolvent" who has ceased to pay his debts in the ordinary course of business, or cannot pay them as they become due, whether he has committed an act of bankruptcy or not (*n*).

Stoppage *in transitu* and seller's lien are sometimes confounded (*o*). Seller's lien arises when the buyer is in default, be he solvent or insolvent. Stoppage *in transitu* arises on the insolvency of the buyer, whether he is in default or not. The lien can only be asserted while the goods are in the possession of the seller or his bailee; stoppage *in transitu* can only be asserted while the goods are in the hands of a third person who holds them for the purposes of transmission only, and not at the will of either the seller or the buyer.

The right of stoppage *in transitu* is exercisable whether the vendor is wholly or partially unpaid; and even if the goods are purchased on credit which has not expired at the time of stoppage (*p*).

Duration of transit.

Goods are in course of transit from the time when

(*i*) As to reservation of right of disposal, see s. 19, *ante*, p. 61.
(*k*) *Ib*. s. 43 (1).
(*l*) Sale of Goods Act, 1893, s. 43 (2).
(*m*) *Ib*. s. 44. See notes to *Lickbarrow* v. *Mason* (1787), 1 Sm. L. C. (ed. 13), 748.
(*n*) *Ib*. s. 62 (3).
(*o*) See as to the distinction between them, per Lord Campbell, *M'Ewan* v. *Smith* (1849), 2 H. L. C. 328.
(*p*) *Inglis* v. *Usherwood* (1801), 1 East, 515.

they are delivered to a carrier by land or water, or other bailee, for the purpose of transmission to the buyer, until the buyer or his agent in that behalf takes delivery from such carrier or bailee (*q*).

If the buyer obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end (*r*). If, after their arrival at the appointed destination, the carrier or other bailee agrees to hold and does hold the goods as bailee for the buyer, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer (*s*). If the buyer rejects the goods and the carrier continues in possession, the transit is not at an end, even though the seller refuse to receive them back (*t*).

When goods are delivered to a ship chartered by the buyer it is a question, depending on the circumstances of each particular case, whether they are in possession of the master as a carrier, or as agent for the buyer (*u*).

If the carrier wrongfully refuses to deliver the goods to the buyer or his agent, the transit is then at an end (*x*).

Effect of part delivery.

If part delivery of the goods has been made to the buyer or his agent, the remainder may be stopped *in transitu*, unless the circumstances of the part delivery show an agreement to give up possession of the whole (*y*).

The delivery of part may have been for the purpose of separating that part from the whole; in which case the seller's lien, or right to stop *in transitu*, as the case may be, still exists over the remainder. On the other hand, part may have been delivered without any intention to separate it from the remainder, and in the

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(*q*) Sale of Goods Act, s. 45 (1); *Kendal* v. *Marshall* (1883), 11 Q. B. D. 356; *Bethell* v. *Clark* (1888), 20 *id.* 615.

(*r*) *Ib.* s. 45 (2); *Whitehead* v. *Anderson* (1842), 9 M. & W. 518, 534; 60 R. R. 819; *Reddall* v. *Union Castle Co.* (1915), 84 L. J. K. B. 360.

(*s*) *Ib.* s. 45 (3); *Ex p. Cooper* (1879), 11 Ch. D. 68, 78; *Lyons* v. *Hoffnung* (1890), 15 A. C. 391.

(*t*) *Ib.* s. 45 (4).

(*u*) *Ib.* s. 45 (5).

(*x*) *Ib.* s. 45 (6); *Bird* v. *Brown* (1850), 3 Exch. 786.

(*y*) *Ib.* s. 45 (7); *Kemp* v. *Falk* (1882), 7 App. Cas. 573; *Ex p. Cooper*, *sup.*

process of delivering the whole, in which case the seller's rights are gone as to the whole (*y*).

It should perhaps be noted that the carrier may agree to hold the goods as the bailee of the seller, in which case the latter can exercise his seller's lien, but not the right to stop *in transitu*.

Effect of seller drawing bills for price.

The effect of the seller drawing bills for the price on the buyer, and the latter accepting them, depends upon the intention of the parties. It may be the intention of the parties that this shall amount to payment; but *prima facie* the effect is merely to give credit to the buyer for the period during which the bill has to run (*z*), so as to suspend the seller's lien and his right to sue for the price until the bill arrives at maturity and is dishonoured (*a*), or the buyer becomes insolvent. It has not the effect of defeating the seller's right of stoppage *in transitu* (*b*).

How stoppage *in transitu* is effected.

Notice.

The seller may exercise his right of stoppage *in transitu* either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case, the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent delivery to the buyer (*c*).

Re-delivery.

When notice is so given to the carrier or other bailee in possession of the goods, he must re-deliver the goods to the seller or according to his directions, the expenses of such re-delivery being borne by the seller (*d*).

(*y*) See note (*y*), p. 79.

(*z*) *Hewison* v. *Guthrie* (1836), 2 Bing. N. C. 755; 42 R. R. 720; Sale of Goods Act, 1893, s. 38 (1).

(*a*) *Valpy* v. *Oakeley* (1851), 16 Q. B. 941; *Griffiths* v. *Perry* (1859), 1 E. & E. 680.

(*b*) *Patten* v. *Thompson* (1816), 5 M. & S. 350; 17 R. R. 350; *Gunn* v. *Bolckow* (1875), 10 Ch. 491, 501.

(*c*) Sale of Goods Act, 1893, s. 46 (1); *Whitehead* v. *Anderson* (1842), 9 M. & W. 518; 60 R. R. 819.

(*d*) *Ib.* s. 46 (2). See *Booth Steamship Co.* v. *Cargo Fleet Iron Co.*, [1916] 2 K. B. 570.

The effect of stoppage *in transitu* is not to put an end to the contract between the carrier and the purchaser or to revest the property in the goods in the unpaid seller. The seller exercising the right is bound to pay the freight and to give directions for the disposal of the goods on arrival (*d*). The carrier, however, delivers at his peril; and in cases where the exercise of the right is contested should interplead.

Effect of sale or pledge by buyer.

As a general rule the right of lien, or retention, or stoppage *in transitu*, is not affected by any sale or other disposition of the goods made by the buyer unless the seller has assented thereto (*e*). If, however, a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a third person, who takes it in good faith and for value, if such transfer to a third person was by way of sale, it defeats the rights of the unpaid seller, and if it was by way of pledge or other disposition for value, the rights of the unpaid seller are subject to those of the transferee (*f*).

Effect of lien or stoppage *in transitu*.

A contract of sale is not, in general, rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage *in transitu* (*g*). But if the seller has exercised such right, and has re-sold the goods, the buyer acquires a good title as against the original buyer (*h*).

Right of re-sale.

When the goods are of a perishable nature, or the seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods

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(*e*) Sale of Goods Act, 1893, s. 47; *Dixon* v. *Yates* (1833), 5 B. & Ad. 313; *Mordaunt* v. *British Oil Co.*, [1910] 2 K. B. 502, where it was held that the seller had not assented.

(*f*) *Ib.* s. 47; *Leask* v. *Scott* (1877), 2 Q. B. D. 376; *Cahn* v. *Pockett's Co.*, [1899] 1 Q. B. 643. See notes to *Lickbarrow* v. *Mason*, 1 Sm. L. C. (ed. 13) 763. As to documents of title, see s. 62; and cf. s. 1 of the Factors Act, 1889.

(*g*) *Ib.* s. 48 (1); *Kemp* v. *Falk* (1882), 7 App. Cas. 573, 578; *Schotsmans* v. *L. & Y. R. Co.* (1867), 2 Ch. 332, 340.

(*h*) *Ib.* s. 48 (2).

and recover damages for any loss occasioned by the breach of contract by the original buyer (*i*).

If the seller expressly reserves a right of re-sale in case the buyer makes default, and, on default by the buyer, re-sells the goods, the original contract of sale is thereby rescinded, but the seller retains any claim he may have for damages (*k*).

§ 3. *Misrepresentation—Condition Precedent—Warranty.*

There are distinctions between a representation, a condition precedent, and a warranty (*l*).

Representation.

A representation by a seller of goods is a statement of fact (not of law (*m*)) made by the seller, before or at the time of making the contract of sale, or some matter or circumstance relating to it, which, even if it appears on the face of the contract, is not one of its terms (*n*).

It follows that, if the representation is untrue, the contract is not broken, unless, indeed, the representation is as to the subject-matter of the contract, so that, if the representation is untrue, the purchaser does not get the thing that he bargained for; in which case the representation amounts to a condition precedent, and the person to whom it was made can decline to perform the contract (*o*).

But an innocent representation, if on a matter material to the contract, may give rise to a claim to rescind the contract, provided the parties can be put substantially *in statu quo*; or it may be a ground for resisting a claim for specific performance of the contract. This, however, cannot ordinarily occur in sales of chattels (*p*).

(*i*) Sale of Goods Act, 1893, s. 48 (3). See notes to *Lickbarrow* v. *Mason*, 1 Sm. L. C. (ed. 13) 752.

(*k*) *Ib*. s. 48 (4).

(*l*) See Chalmers on Sale, pp. 37-39 (ed. 10); Anson on Contracts, pp. 186, 366-7 (ed. 16).

(*m*) *Lewis* v. *Jones* (1825), 4 B. & C. 506; 28 R. R. 360.

(*n*) *Hopkins* v. *Tanqueray* (1854), 15 C. B. 130, is a good example of a representation.

(*o*) *Behn* v. *Burness* (1863), 3 B. & S. 751; *Kennedy* v. *Panama R. Co.* (1867), L. R. 2 Q. B. 587 *et seq.; Hopkins* v. *Tanqueray, sup.*

(*p*) *Seddon* v. *N. E. Salt Co.*, [1905] 1 Ch. 326. Cf. *Scott* v. *Coulson*, [1903] 2 Ch. 249.

Action of deceit for fraudulent misrepresentation.

If the representation is not only untrue but fraudulent, *i.e.*, if the seller made it knowing that it was untrue, or not believing that it was true, or indifferent whether it was true or false, as distinguished from the case in which an untrue representation is made carelessly without the matter being present to the mind of the person making it (*q*), the buyer may have a right either to rescind the contract or to bring an action of deceit for damages (*r*).

Blackburn, J., says (*s*):—

Rescission.

> "There is a very important difference between cases where a contract may be rescinded on account of fraud, and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained. It is enough to show that there was a fraudulent representation as to *any part* of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration. For example, where a horse is bought under a belief that it is sound, if the purchaser was induced to buy by a fraudulent representation as to the horse's soundness, the contract may be rescinded. If it was induced by an honest misrepresentation as to its soundness, though it may be clear that both vendor and purchaser thought that they were dealing about a sound horse and were in error, yet the purchaser must pay the whole price."

Condition precedent.

A condition precedent is a term of the contract, the non-fulfilment of which gives to the person for whose benefit it was inserted the right to decline to perform the contract. Examples of conditions precedent occur where the contract of sale is made at a time when the goods are not in a deliverable state and they are to be put into that state by the seller. Here their being put

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(*q*) *Derry* v. *Peek* (1889), 14 App. Cas. 337; *Angus* v. *Clifford*, [1891] 2 Ch. 449; 6 L. Q. R. 72.

(*r*) See notes to *Pasley* v. *Freeman*, 2 Sm. L. C. (ed. 13) 101; and to *Chandelor* v. *Lopus*, *id.* 57.

(*s*) *Kennedy* v. *Panama R. Co.*, *sup.*; *Houldsworth* v. *City of Glasgow Bank* (1880), 5 App. Cas. 317.

into that state is a condition precedent, for the buyer is not bound to accept them till this has been done (*t*).

Sale by description.

In a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description; and this applies to the sale of *specific* goods by description, where the buyer has not seen them but relies on the seller's description (*u*). If the sale be by sample, as well as by description, it is not sufficient that the goods correspond with the sample if they do not also correspond with the description (*x*).

Fitness for particular purpose.

Where the buyer makes known to the seller the particular purpose for which the goods are required, so as to show that he relies on the seller's skill and judgment, and the goods are such as the seller in the course of his business supplies, there is an implied condition that the goods shall be reasonably fit for that purpose (*y*); but if the contract is for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose (*z*). The seller will be liable, if the goods are defective, even if the defect be latent and not discoverable by reasonable care and skill (*a*).

Merchantable quality.

If goods are bought by description from a seller who deals in goods of that description, there is an implied condition that the goods shall be of merchantable quality (*b*); if, however, the buyer has examined the goods, there is no implied condition as to defects which such examination ought to have revealed (*b*).

(*t*) *Ante*, p. 59.

(*u*) *Varley* v. *Whipp*, [1900] 1 Q. B. 513; *Wallis* v. *Pratt*, [1911] A. C. 393; *Baldry* v. *Marshall*, [1925] 1 K. B. 260.

(*x*) Sale of Goods Act, 1893, s. 13.

(*y*) *Ib.* s. 14 (1). *Randall* v. *Newson* (1877), 2 Q. B. D. 102; *Gillespie* v. *Cheney*, [1896] 2 Q. B. 59; *Clarke* v. *A. & N. Co-Op. Soc.*, [1903] 1 K. B. 155; *Preist* v. *Last*, [1903] 2 K. B. 148; *Jackson* v. *Watson*, [1909] 2 K. B. 193; *Geddling* v. *Marsh*, [1920] 1 K. B. 668.

(*z*) S. 14 (1). *Bristol Co.* v. *Fiat Motors*, [1910] 2 K. B. 831; *Baldry* v. *Marshall*, *sup.*

(*a*) *Frost* v. *Aylesbury Dairy Co.*, [1905] 1 K. B. 608.

(*b*) Sale of Goods Act, 1893, s. 14 (2). *Wren* v. *Holt*, [1903] 1 K. B. 610, where a sale of beer in a beerhouse was held to be within this provision; *Bristol Co.* v. *Fiat Motors*, *sup.*; *Jackson* v. *Rotax*

Usage of trade.

An implied condition as to quality, or fitness for a particular purpose, may be annexed by the usage of trade (*c*).

Sale by sample.

When goods are sold by sample there is an implied condition, (1) that the bulk shall correspond with the sample in quality; (2) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample; and (3) that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample (*d*).

Where the contract is made subject to a condition precedent to be performed, for example, a valuation to be made by a third party, who does not make the valuation, the sale cannot take effect (*e*). But if the performance of a condition becomes impossible owing to the act or default of one of the parties, the condition is considered, as against him, as having been performed (*f*).

Warranty.

A warranty is an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated (*g*).

When condition, and when warranty.

The buyer may waive a condition to be fulfilled by the seller, or may treat the breach of such condition as a breach of warranty and not as a ground for treating the contract as repudiated (*h*).

Whether a stipulation is a condition, or a warranty, depends in each case on the construction of the contract of sale, and a stipulation may be a condition, though called a warranty in the contract (*i*).

Co., [1910] 2 K. B. 937; *Sumner, Permain & Co.* v. *Webb & Co.*, [1922] 1 K. B. 55; *Morelli* v. *Fitch and Gibbons* (1928), 44 T. L. R. 737; [1928] 2 K. B. 636.

(*c*) *Ib.* s. 14 (3).

(*d*) *Ib.* s. 15.

(*e*) *Ib.* s. 9.

(*f*) *Mackay* v. *Dick* (1881), 6 App. Cas. 251.

(*g*) Sale of Goods Act, 1893, s. 62 (1). *Varley* v. *Whipp*, [1900] 1 Q. B. 513.

(*h*) *Ib.* s. 11 (1a).

(*i*) *Ib.* s. 11 (1b). See per Bowen, L.J., *Bentsen* v. *Taylor*, [1893] 2 Q. B. 280.

When a contract of sale is not severable and the buyer has accepted all or part of the goods, or when specific goods are sold and the property has passed to the buyer, the breach of a condition on the part of the seller can only be treated as a breach of warranty, unless there is an agreement to the contrary (*k*).

Remedy for breach of warranty.

When there has been a breach of warranty, the buyer may either set up the breach in diminution or extinction of the price, or he may sue the seller for damages (*l*).

Under the provisions of various modern statutes certain warranties are implied on the sale of goods coming within their scope (*m*).

Warranty of title.

It was for a long time doubtful to what extent there was an implied warranty on the part of the seller of goods that he had a good title thereto (*n*).

Now, by the Sale of Goods Act (*o*), it is provided that, in a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is :—

(1) " An implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods, and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass " (*p*).

(2) " An implied warranty that the buyer shall have and enjoy quiet possession of the goods " (*p*).

(3) " An implied warranty that the goods shall be free from any charge or incumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made."

(*k*) Sale of Goods Act, 1893, s. 11 (1c); *Wallis* v. *Pratt*, [1911] A. C. 393.

(*l*) *Ib*. s. 53.

(*m*) *E.g.*, Merchandise Marks Act, 1887; Anchors and Chain Cables Act, 1899; Fertilisers and Feeding Stuffs Act, 1906.

(*n*) Benjamin on Sale (ed. 6) 686; *Sims* v. *Marryat* (1851), 17 Q. B. 281; *Morley* v. *Attenborough* (1849), 3 Ex. 512; *Eichholz* v. *Bannister* (1864), 17 C. B. (N.S.) 708.

(*o*) S. 12.

(*p*) See *Niblett* v. *Confectioners' Materials Co.* (1921), 37 T. L. R. 653.

Sales by sheriffs, or forced sales by public auction, or sales of unredeemed pledges by pawnbrokers, are instances of sales which are generally made under circumstances such as to show that there is no intention to give an implied warranty (*q*).

§ 4. *Bills of Lading—Delivery Orders—Dock Warrants.*

Bill of lading defined.

Lord Blackburn says (*r*) :—

> A bill of lading (*s*) is a writing signed on behalf of the owner of the ship in which goods are embarked, acknowledging the receipt of the goods, and undertaking to deliver them at the end of the voyage (subject to such conditions as may be mentioned in the bill of lading). The bill of lading is sometimes an undertaking to deliver the goods to the shipper by name, or his assigns; sometimes to order or assigns, not naming any person, which is apparently the same thing; and sometimes to a consignee by name, or assigns, but in all its usual forms it contains the word assigns.
>
> The bill of lading is, therefore, a written contract between those who are expressed to be parties to it, on behalf of their principals if they be agents, that is, generally speaking, between the master of the ship on behalf of his principals the shipowners, on the one part, and the person named as shipper of the goods on the behalf of the person who, at the time of shipment, was his principal, on the other part, by which it is agreed that the shipowner is to deliver the goods to the person who shall fill the character of assign.

Indorsement and delivery of bill of lading may pass property.

Sets of bills.

Goods shipped are physically incapable of delivery during the voyage; but it is a rule of the law merchant that the property in the goods *may* pass, not (as is sometimes said) that it necessarily passes (*t*), by indorsement and delivery of the bill of lading. Bills of lading are usually drawn in sets of three. If the bills are trans-

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(*q*) *Chapman* v. *Speller* (1850), 14 Q. B. 621; *Morley* v. *Attenborough*, *sup.*; *Bagueley* v. *Hawley* (1867), L. R. 2 C. P. 625; *Ex p. Villars* (1874), 9 Ch. 437.

(*r*) Blackburn on Sale (ed. 3), 421.

(*s*) See the form in the Appendix. The Carriage of Goods by Sea Act, 1924, imposes on the carrier certain minimum responsibilities out of which he cannot contract, in respect of the carriage of goods under bills of lading on voyages (other than coasting voyages) from ports in Great Britain or Northern Ireland, and at the same time gives him the benefit of certain statutory exceptions.

(*t*) *Sewell* v. *Burdick* (1884), 10 App. Cas. 74; Sale of Goods Act, s. 19 (3), *ante*, p. 62.

ferred to different *bona fide* purchasers for value, the goods pass to the purchaser who is first in point of time (*u*); but the shipowner may safely deliver the goods to the person who first presents either of the set, in the absence of notice of any prior claim (*x*). By the common law, although the transfer of a bill of lading might pass the property in the goods, it did not operate as an assignment of the contract expressed in the bill of lading, and therefore no right was conferred on the assignee to sue upon that contract. This, however, was altered by the Bills of Lading Act, 1855 (*y*), by which, after reciting that :—

Bills of Lading Act, 1855.

> "By the custom of merchants a bill of lading of goods being transferable by indorsement, the property in the goods may thereby pass to the indorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property,"

it was enacted :—

> Sect. 1. "Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself."

Delivery orders—dock warrants.

Delivery orders (*z*), dock warrants, and wharfingers' receipts are generally written authorities to deliver the possession of goods (*a*), so framed that the right to possess the goods passes by indorsement and delivery of the documents. It will be noticed that, as the goods are on land, there is no reason why the indorsee should not

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(*u*) *Barber* v. *Meyerstein* (1870), L. R. 4 H. L. 317; *Sanders* v. *Maclean* (1883), 11 Q. B. D. 327.

(*x*) *Glyn* v. *E. & W. Ind. Docks Co.* (1882), 7 App. Cas. 591. As to the effect of the transfer of a bill of lading upon the right of stoppage *in transitu*, see *ante*, p. 81.

(*y*) 18 & 19 Vict. c. 111.

(*z*) The form may run as follows :—"To A. B., I hereby undertake to deliver to your order endorsed hereon" (description of goods). (Signed) C. D. *Farmiloe* v. *Bain* (1876), 1 C. P. D. 446.

(*a*) *Gunn* v. *Bolckow* (1875), 10 Ch. 499.

at once produce the document to the bailee in whose possession the goods are, and take possession of the goods or require the bailee to attorn to him, *i.e.*, become his bailee. The common law, while, as we have seen, it allowed the transfer of a bill of lading to pass the property in the goods on the ground of the physical impossibility of a purchaser acquiring possession, did not attribute the like effect to a transfer of a document of the nature under consideration.

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A man does not acquire possession of the goods merely by receiving a delivery order; in order to do so he must either have the goods delivered to him, or, if they are in the possession of a bailee, must procure attornment by the bailee to him (*b*), and this may be effected by merely lodging the delivery order with the bailee, provided the bailee does not dissent (*c*).

It should be observed that, as the transfer of a delivery order effected by indorsement and delivery only transfers the right to possess, as distinguished from possession itself, the mere fact of a person taking such a transfer does not amount to acceptance and receipt of the goods within s. 4 of the Sale of Goods Act, 1893, until the person in whose possession the goods are consents to hold them as bailee for, or attorns to, the transferee (*d*).

(*b*) *Farina* v. *Home* (1846), 16 M. & W. 119; *McEwan* v. *Smith* (1849), 2 H. L. C. 309.

(*c*) *Pearson* v. *Dawson* (1858), E. B. & E. 448.

(*d*) *Farina* v. *Home*, *sup.*

CHAPTER IV.

SALES, PURCHASES, AND PLEDGES BY AGENTS (*a*).

Chap. IV.

Agency, how created;

(1) by express contract:

The relation of principal and agent may be created—

(1) By express contract, which may be either written or without writing (*b*), even if the agent be appointed to sign a contract under the 4th section of the Statute of Frauds (*c*), or the 4th section of the Sale of Goods Act, 1893 (*d*).

An agent appointed to execute a deed for another must be appointed by deed (called a power of attorney (*e*)).

(2) by implication.

(2) By implication, where a person is placed in such a position that, according to the ordinary usage of mankind, he would be understood to act for and represent the principal (*f*).

For example, if a man puts goods into the custody of another whose common business is to sell such goods, he gives him implied authority to sell them, unless he limits his authority (*g*).

Husband and wife:

Also, a wife has in many cases an implied authority to pledge her husband's credit (*h*).

(3) from necessity.

(3) From the necessity of the case.

(*a*) See as to contracts by agents generally, Bowstead on Agency.

(*b*) *Mortlock* v. *Buller* (1804), 10 Ves. 311; 7 R. R. 417; *Heard* v. *Pilley* (1869), 4 Ch. 548.

(*c*) 29 Car. 2, c. 3; *Emmerson* v. *Heelis* (1809), 2 Taunt. 38; *Acebal* v. *Levy* (1834), 10 Bing. 378.

(*d*) Formerly s. 17 of the Statute of Frauds, as amended by Lord Tenterden's Act, 1828, s. 7, *ante*, p. 64.

(*e*) Shep. Touch. 57.

(*f*) *Pole* v. *Leask* (1864), 33 L. J. Ch. 155.

(*g*) *Pickering* v. *Busk* (1812), 15 East, 38; 13 R. R. 364.

(*h*) See *Debenham* v. *Mellon* (1880), 6 App. Cas. 24; and notes to *Manby* v. *Scott*, 2 Sm. L. C. (ed. 13) 457; *Miss Gray, Lim.* v. *Cathcart* (1922), 38 T. L. R. 562; *Seymour* v. *Kingscote* (1922), 38 T. L. R. 586.

Master of ship.

On this principle, where the master of a ship (*i*) cannot communicate with the owner or his agent (*k*), he may contract for the necessary repairs of the ship (*l*) and other necessaries for the ship, and may raise money necessary for the prosecution of the voyage (*m*), and for these purposes may pledge the credit of the shipowner. A wife living apart from her husband may in some cases pledge his credit for necessaries (*n*).

(4) By ratification.

(4) By ratification. If A., unauthorised by B., makes a contract on his behalf with C., which contract B. subsequently adopts, A. becomes B.'s agent *ab initio*.

In this case, if C. entered into the contract believing that he was contracting with B., and B. subsequently admits that such is the case, C. is precisely in the position in which he intended to be. If C. intended to contract with A., he retains his remedy against him, and is not injured by the ratification (*o*). B. may ratify an acceptance by A. of an offer by C., even though C. has endeavoured to withdraw the offer before the ratification (*p*). B. cannot, however, ratify a contract which A., without authority, intended to make on his behalf, if A. did not at the time of making the contract profess to act on behalf of a principal (*q*).

"General" and "special" agent.

There is a distinction between an agent who has a general authority to do things of a certain nature and one who is employed *pro hac vice*, who is, in other words, a special agent.

An agent of the former class has the right to do all acts which are incident to his general authority; and, unless the person dealing with him has notice that his authority

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(*i*) *Post*, Chap. VII.

(*k*) *Gunn* v. *Roberts* (1874), L. R. 9 C. P. 331.

(*l*) *Webster* v. *Seekamp* (1821), 4 B. & Ald. 352; 23 R. R. 307.

(*m*) *Beldon* v. *Campbell* (1851), 6 Ex. 886; *Arthur* v. *Barton* (1840), 6 M. & W. 138; *The Mariposa*, [1896] P. 273.

(*n*) See notes to *Manby* v. *Scott*, 2 Sm. L. C. (ed. 13) 462.

(*o*) *Bird* v. *Brown* (1850), 4 Ex. 786; *Maclean* v. *Dunn* (1828), 4 Bing. 722; 29 R. R. 714.

(*p*) *Bolton* v. *Lambert* (1888), 41 Ch. D. 295.

(*q*) *Keighley* v. *Durant*, [1901] A. C. 240.

is limited, *i.e.*, that he has no authority to do some of these acts, the principal is bound by such acts of the agent (*r*). On the other hand, a special agent with only a limited authority cannot bind his principal by an act beyond the scope of his authority (*s*).

For example, if a horse-dealer having a horse to sell directs his salesman to sell it, but not to warrant it, and the salesman warrants it, the master will be bound by the warranty, because the salesman is acting within the general scope of his authority; and the public cannot be supposed to be cognisant of any private communication between his master and him (*t*). But if a private person, being the owner of a horse, directs his servant to sell the horse, but not to warrant him, and he does warrant him, the owner is not bound, because the servant was not acting within the scope of his authority (*u*).

Agent to sign contract.

When an agent, either general or special, has authority to sell, he has authority to make the contract for sale binding; and therefore, in cases falling within s. 4 of the Sale of Goods Act, 1893, he can sign a note in writing of the contract so as to bind his principal.

Agent contracting in his own name.

Where a man, who is in fact an agent, contracts in his own name without qualification, he is a contracting party (*x*); but, if words are used which plainly show that he is contracting not for himself but for someone else, effect will be given to them whether they are contained in the body of the instrument or are annexed to his signature (*y*).

Auctioneer.

An auctioneer (*z*) is a person employed by the vendor as his agent to sell, and therefore to sign the contract for sale, on his behalf. The highest bidder at the sale by

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(*r*) *Collen* v. *Gardner* (1856), 21 Beav. 540; *Watteau* v. *Fenwick*, [1893] 1 Q. B. 346; *Rainbow* v. *Howkins*, [1904] 2 K. B. 322.

(*s*) *Fenn* v. *Harrison* (1790), 3 T. R. 757.

(*t*) *Howard* v. *Sheward* (1866), L. R. 2 C. P. 148.

(*u*) *Brady* v. *Todd* (1861), 9 C. B. (N.S.) 592.

(*x*) *Higgins* v. *Senior* (1841), 8 M. & W. 844; 58 R. R. 884.

(*y*) *Fairlie* v. *Fenton* (1870), L. R. 5 Ex. 169; *Repetto* v. *Millar's*, [1901] 2 K. B. 306. See notes to *Thomson* v. *Davenport* 2 Sm. L. C. (ed. 13) 356.

(*z*) *Ante*, p. 73.

the act of bidding (*a*) constitutes the auctioneer his agent for the purpose of signing the contract contained in the written conditions of sale. The auctioneer's clerk may be, and very often is, the agent of the purchaser to sign for him (*b*). The signature must be at the time of the sale and not afterwards (*c*).

The owner may withdraw the property (*d*), and the bidder may withdraw his bid, which is a mere offer (*e*), at any time before the bargain is concluded by the fall of the hammer.

In order to make a valid memorandum of the contract within s. 4 of the Sale of Goods Act, 1893, the document which the auctioneer signs must contain all the terms of the contract; so that, if he simply writes down the name of the purchaser and the price in a book which does not incorporate the conditions, it is not sufficient (*f*). Each lot is *prima facie* the subject of a separate contract for sale (*g*).

Where a sale of goods by auction is not expressed to be subject to a reserve price, or to the right of the seller to bid, it is not lawful for him or any person authorised by him (who is called a puffer) to bid (*h*). But the sale may be expressly made subject to a reserve price or to the right of the seller or a person acting on his behalf to bid (*i*).

By the Auctions (Bidding Agreements) Act, 1927, it is made a penal offence for a " dealer " (*i.e.*, a person who in the normal course of business attends sales by

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(*a*) *Emmerson* v. *Heelis* (1809), 2 Taunt. 38; 11 R. R. 520; *White* v. *Proctor* (1811), 4 Taunt. 209; 13 R. R. 580.

(*b*) *Peirce* v. *Corf* (1874), L. R. 9 Q. B. 210; *Sims* v. *Landray*, [1894] 2 Ch. 318; *Bell* v. *Balls*, [1897] 1 Ch. 663.

(*c*) *Mews* v. *Carr* (1856), 1 H. & N. 484; *Bell* v. *Balls*, *sup.*

(*d*) *Warlow* v. *Harrison* (1858), 1 E. & E. 295; *Rainbow* v. *Howkins*, [1904] 2 K. B. 322.

(*e*) *Payne* v. *Cave* (1789), 3 T. R. 148; 1 R. R. 679; Sale of Goods Act, 1893, s. 58 (2).

(*f*) *Hinde* v. *Whitehouse* (1806), 7 East, 558; 8 R. R. 676; *Peirce* v. *Corf*, *sup.*

(*g*) *Emmerson* v. *Heelis*, *sup.*; Sale of Goods Act, 1893, s. 58 (1).

(*h*) Sale of Goods Act, 1893, s. 58 (3).

(*i*) *Ib.* s. 58 (4).

auction for the purpose of purchasing goods with a view to re-selling them (s. 1 (2)) to enter into a bargain with another person to abstain from bidding at an auction generally or for some particular lot. But an agreement in writing made by a dealer with another person or other persons before the auction to purchase goods on joint account is not within the Act, provided a copy of the agreement is deposited with the auctioneer before the goods are purchased. Any sale which has been the subject of an agreement constituting an offence under the Act may, as against a purchaser who has been a party to the agreement, be treated as a sale induced by fraud (*k*).

An auctioneer who sells goods in the ordinary way, generally has the possession of them, and is liable as a bailee (*l*). He can sue for the price in his own name (*m*), and has a lien for the purchase-money (*m*); his authority is to receive payment in cash only (*n*). If the goods do not belong to the vendor, the auctioneer is liable, as for a conversion of the goods, at the suit of the real owner (*o*).

Brokers.

A broker for sale is a person having authority both from buyer and seller to sign a memorandum of the bargain so as to make the contract good against each (*p*). He also finds buyers and sellers and negotiates between them. In many cases he is originally employed by one party with special instructions as to price; and, in these cases, though he cannot act as the agent of the other party in fixing the price, there is no objection to his acting for both parties in seeing that they understand the contract and that it is made binding (*r*), or to his signing for the party who did not employ him to fix the

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(*k*) 17 & 18 Geo. 5, c. 12.

(*l*) *Ante*, p. 28.

(*m*) *Williams* v. *Millington* (1788), 1 H. Bl. 81; 2 R. R. 724; *Woolfe* v. *Horne* (1877), 2 Q. B. D. 355; *Hindle* v. *Brown* (1908), 98 L. T. 44, 791. See notes to *Thomson* v. *Davenport*, 2 Sm. L. C. (ed. 13) 379.

(*n*) *Pape* v. *Westacott*, [1894] 1 Q. B. 272.

(*o*) *Consolidated Co.* v. *Curtis*, [1892] 1 Q. B. 495.

(*p*) Blackburn on Sale, 83.

(*r*) *Ib.* 83, 84.

price if authorised by him to do so (*s*). A broker has neither the custody nor the possession of the goods to be sold (*t*); nor can he sue in his own name on a contract made by him as a broker (*u*), unless in fact he had no principal (*x*).

As a general rule, a person employing a broker must be taken to have authorised him to act as brokers generally act; and the person who treats with a broker has a right to assume that he has such authority, and to consider the principal bound by all acts falling within such authority (*y*). If a principal wishes to limit the authority of a broker, and to withhold from him the power to do the acts generally done by brokers, he must give notice of such limitation to the other person with whom he wishes to contract through the broker.

Custom of the market.

The authority of the broker may depend upon the custom of the trade, which in the first place must be ascertained by evidence (*z*); but, when a trade has been long established, judicial notice will be taken of its customs (*a*).

Where a principal employs a broker to buy or sell for him in a market of the usage of which he is ignorant, he authorises him to make a contract upon the footing of such usages as are reasonable and do not alter the character of the contract, but not on the footing of unreasonable usages (*b*). If, however, he knows the usage, he is bound by it even if it be unreasonable (*b*).

Signed entry in broker's book.

Where a contract is entered into through the intervention of a broker, he reduces it into writing, and ought to sign and deliver a copy to each party, and he generally enters it in a book which he keeps for that purpose. The

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(*s*) See *Thompson* v. *Gardiner* (1876), 1 C. P. D. 777.
(*t*) *Baring* v. *Corrie* (1818), 2 B. & Ald. 137; 20 R. R. 383.
(*u*) *Fairlie* v. *Fenton* (1870), L. R. 5 Ex. 169.
(*x*) *Harper* v. *Vigers*, [1909] 2 K. B. 549.
(*y*) *Heyworth* v. *Knight* (1864), 17 C. B. (N.S.) 298.
(*z*) See *Scott* v. *Godfrey*, [1901] 2 K. B. 726.
(*a*) *Brandao* v. *Barnett* (1846), 12 Cl. & F. 787.
(*b*) *Robinson* v. *Mollett* (1874), L. R. 7 H. L. 802; *Perry* v. *Barnett* (1885), 15 Q. B. D. 388. See notes to *Wigglesworth* v *Dallison*, 1 Sm. L. C. (ed. 13) 619.

entry in the book, when signed by the broker, is a sufficient memorandum of the contract to satisfy s. 4 of the Sale of Goods Act (*c*).

"Sold" and "bought" notes.

The copy of the contract given to the seller is called the "sold note," and that given to the buyer the "bought note." The sold and bought notes, if they agree, constitute a sufficient memorandum in writing of the contract to satisfy the above-mentioned statute (*c*).

No contract can be established where the bought and sold notes differ in their terms; as, for instance, where they vary in the description of the goods, or as to the time at which payment is to be made (*d*).

Factor.

"A factor is a person to whom goods are consigned for sale by a merchant residing abroad or at a distance from the place of sale; and he usually sells in his own name without disclosing that of his principal; the latter therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods and gives him authority to sell in his own name" (*e*). It follows that special instructions given to the factor, restrictive of his apparent authority, do not affect a purchaser, unless communicated to him (*f*). A factor has authority to sell on the usual terms of credit (*g*); to receive and give receipts for the price (*h*); but he had not at common law authority to pledge the goods (*i*). And his authority might be revoked at any time before the goods were sold (*k*).

Repealed Factors Acts.

Alterations in the law were made in 1823, 1825, 1842, and 1877 (*l*), by Acts known as the "Factors Acts."

(*c*) *Thompson* v. *Gardiner*, *sup.*; *Sievewright* v. *Archibald* (1851), 17 Q. B. 103.

(*d*) *Grant* v. *Fletcher* (1826), 5 B. & C. 436; 29 R. R. 286; *Sievewright* v. *Archibald*, *sup.*; *Gregson* v. *Ruck* (1843), 4 Q. B. 737.

(*e*) Per Abbott, C.J., *Baring* v. *Corrie* (1818), 2 B. & Ald. 143.

(*f*) *Ex p. Dixon* (1876), 4 Ch. D. 133; *Stevens* v. *Biller* (1883), 25 Ch. D. 31.

(*g*) *Scott* v. *Surman* (1742), Willes, 407; *Houghton* v. *Matthews* (1803), 3 B. & P. 489; 7 R. R. 815.

(*h*) *Drinkwater* v. *Goodwin* (1775), Cowp. 255; *Fish* v. *Kempton* (1849), 7 C. B. 687.

(*i*) *Ante*, p. 46.

(*k*) *Raleigh* v. *Atkinson* (1840), 6 M. & W. 670; 55 R. R. 764.

(*l*) See Chalmers on Sale, pp. 160 *et seq.* (ed. 10).

Factors Act, 1889.

Mercantile agent.

These Acts have been repealed and re-enacted with amendments, as regards England and Ireland, but not Scotland, by the Factors Act, 1889 (*m*). The effect of the Act is that, where a " mercantile agent " (*n*) is in the possession, by himself or his bailee, of goods, or documents of title to goods, with the consent of the owner, any sale, pledge, or other disposition made by him, in the ordinary course of his business as mercantile agent (*n*), is as valid in favour of a person dealing *bona fide* as if he were expressly authorised to make it, and notwithstanding that his authority has been determined (*o*); and similar provisions are contained in the Act and repeated in s. 25 of the Sale of Goods Act, 1893, in respect of dealings by a seller (*p*) who remains in possession, or by a buyer or person who has agreed to buy (*q*) and has obtained possession of the goods or documents of title (*r*).

A person to whom possession is given under a conditional agreement to purchase is within the section and a sale by him to a third party who buys in good faith will confer a good title (*s*).

If several persons deal jointly with the mercantile agent and one of them is not acting in good faith, the others are not protected by the statute (*t*). A custom in any particular trade that a mercantile agent employed

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(*m*) 52 & 53 Vict. c. 45.

(*n*) 52 & 53 Vict. c. 45, s. 1; *Oppenheimer* v. *Attenborough*, [1908] 1 K. B. 221; *Weiner* v. *Harris*, [1910] 1 K. B. 285, overruling *Hastings* v. *Pearson*, [1893] 1 Q. B. 62; *Janesich* v. *Attenborough* (1910), 102 L. T. 605; *Inglis* v. *Robertson*, [1898] A. C. 616; *Folkes* v. *King*, [1923] 1 K. B. 282; *Heap* v. *Motorists' Advisory Agency*, [1923] 1 K. B. 577.

(*o*) 52 & 53 Vict. c. 45, s. 2. He must receive possession in his capacity as mercantile agent: *Lowther* v. *Harris*, [1927] 1 K. B. 393.

(*p*) 52 & 53 Vict. c. 45, s. 8; Sale of Goods Act, 1893, s. 25 (1).

(*q*) *Ib.* s. 9. Sale of Goods Act, 1893, s. 25 (2). *Shenstone* v. *Hilton*, [1894] 2 Q. B. 452; *Helby* v. *Matthews*, [1895] A. C. 471; *Whiteley* v. *Hilt*, [1918] 2 K. B. 808.

(*r*) *Hugill* v. *Masker* (1889), 22 Q. B. D. 364; *Cahn* v. *Pockett's Co.*, [1899] 1 Q. B. 643.

(*s*) *Lee* v. *Butler*, [1893] 2 Q. B. 318; *Marten* v. *Whale*, [1917] 2 K. B. 480.

(*t*) *Oppenheimer* v. *Frazer*, [1907] 2 K. B. 50.

to sell goods has no authority to pledge them does not prevent the operation of s. 2 of the Act (*u*).

Although the mercantile agent may have obtained possession of the goods by fraud, yet he is " in possession with the consent of the owner " (*x*); but not if the fraud amounts to " larceny by a trick " (*y*). The conviction of the person who wrongfully deals with the goods for larceny as a bailee does not in any way affect a title acquired under these Acts (*z*).

Del credere agent.

A " *del credere* " agent guarantees to his principal the solvency of the person with whom he contracts. If, for instance, he be a broker for sale, or a factor, he undertakes to pay for the goods that he sells if the purchaser fails to pay for them (*a*). A *del credere* commission is " the premium or price given by the principal to the factor for a guarantee " (*b*). An agreement to sell upon a *del credere* commission need not be in writing, as it is an undertaking to indemnify against loss and not a promise to answer for the debt, default, or miscarriage of another person within the 4th section of the Statute of Frauds (*c*), though the distinction is somewhat fine.

(*u*) *Oppenheimer* v. *Attenborough*, *supra*.

(*x*) *Cahn* v. *Pockett's Co.*, [1899] 1 Q. B. 643, 659; *Folkes* v. *King*, *sup*.

(*y*) *Oppenheimer* v. *Frazer*, *sup.*; see *Lake* v. *Simmons*, [1927] A. C. 487.

(*z*) *Payne* v. *Wilson*, [1895] 1 Q. B. 657; 2 *id.* 537.

(*a*) *Ex p. White* (1870), 6 Ch. App. 397; *Grove* v. *Dubois* (1786), 1 T. R. 112; 16 R. R. 664.

(*b*) Per Lord Ellenborough, *Morris* v. *Cleasby* (1816), 4 M. & S. 574; 16 R. R. 544.

(*c*) *Couturier* v. *Hastie* (1852), 8 Ex. 40; *Wickham* v. *Wickham* (1855), 2 K. & J. 478.

CHAPTER V.

GIFTS.

§ 1. *Gifts inter vivos.*

Chap. V.

What constitutes a gift—acceptance.

A GIFT (*a*) is a transfer of property without valuable consideration by one person (called the "donor") to another (called the "donee"), who accepts the property (*b*).

A gift cannot be made unless the donee is ascertained (*c*) and is capable of taking (*d*). It is, of course, not effective unless the donee accepts (*b*); but, if made by deed, it vests in him until he repudiates the gift (*e*); and acceptance is presumed until dissent is signified (*f*).

Gifts and assignments for value distinguished.

There is a broad distinction between an assignment for value and a gift. In an assignment for value, if the transfer of the property is for any reason imperfect, we have to consider the intentions of two persons—of the person who makes and of the person who takes under the assignment; and if it appears that both intended that a perfect assignment should be made, there will be an enforceable contract to complete the assignment, and the Court will compel the assignor to do everything that

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(*a*) It should be observed that, in the Year Books, "*done*," which is generally translated "gift," does not necessarily imply that there was no consideration; compare the phrases "donee" in tail, "to give" in tail, where, if the reversion is retained by the donor, there is necessarily consideration, owing to the tenancy created.

(*b*) Y. B. 7 Edw. 4, 29, pl. 14; *Lyte* v. *Peny* (1542), Dyer, 49 a (8); *Hill* v. *Wilson* (1873), 8 Ch. 893.

(*c*) Y. B. 11 Hen. 7, 12, pl. 4; *Paston and Genney's Case* (1462), 11 Edw. 4, 2, pl. 2; Br. Abr. *Done* 31; *Roberts* v. *Roberts* (1865), 11 Jur. (N.S.) 992.

(*d*) *Haynes's Case* (1613), 12 Rep. 113; 3rd Instit. 110.

(*e*) Y. B. 7 Edw. 4, 20, pl. 21; *Standing* v. *Bowring* (1885), 31 Ch. D. 282.

(*f*) See *London and County Bank* v. *London and River Plate Bank* (1888), 21 Q. B. D. 541.

may be necessary to perfect the assignment or, in the alternative, to pay damages where damages would be an adequate compensation.

In the case of a gift, the nature of the transaction depends entirely on the will of the donor. If he does something which does not really amount to a complete transfer of the property to the donee, we have no reason to suppose that he intended to do anything more than he actually did. He may perhaps at one time have intended to make a gift; but the very fact of his not having completely transferred the property may show that if he ever had that intention he subsequently altered his mind. These considerations lead to the cardinal rule that an imperfect gift creates no right that can be enforced; in other words, that a person cannot be compelled to do anything to perfect a gift by him (*g*). There is a *locus pœnitentiæ* so long as it is incomplete (*h*). But the subsequent conduct of the donor may make it inequitable for him to refuse to complete the gift and enable the donee to compel him to perfect it; as, for example, if A. gives a piece of land to B. without making a formal conveyance, and B., to A.'s knowledge, builds upon it (*i*).

Gift obtained by misrepresentation.

If a gift has been obtained by a misrepresentation, though innocent, of fact by the donee, the donor has a right in equity to recover his gift from the donee (*k*).

No gift unless— (1) complete transfer, or declaration of trust;

Where it is alleged that a transaction amounts to a gift, two questions arise, viz. :—

(1.) Was there a complete transfer of the property according to its nature? If the donor intended to transfer the property, has everything necessary to vest it in the donee been done? If the donor did not so intend, has a

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(*g*) See this discussed in 1 Vaizey on Settlements, 92 *et seq.*

(*h*) *Antrobus* v. *Smith* (1805), 12 Ves. 39; 8 R. R. 278; *Edwards* v. *Jones* (1836), 1 My. & Cr. 226; 43 R. R. 178; *Lyte* v. *Peny* (1542), Dyer, 49*a*.

(*i*) Per Westbury, C., *Dillwyn* v. *Llewellyn* (1862), 4 De G. F. & J. 521.

(*k*) *Re Glubb*, [1900] 1 Ch. 354.

trust of the property for the benefit of the donee been validly constituted? An ineffectual attempt to transfer the property (contrary to the usual rule of construction *ut res magis valeat*) will not be construed to operate as the creation of a valid trust.

(2) intention to give.

(2.) With what intention was the transfer made?

A man may make a voluntary transfer of property, but not intend to make a gift of it. He may intend that the transferee should hold it as his trustee. The intention that the transfer should operate as a gift may be proved by the acts as well as by the words of the donor.

Milroy v. *Lord.*

The principles that we have stated are laid down very clearly by Turner, L.J., in his judgment in *Milroy* v. *Lord* (*l*). He says:—

> "I take the law of this Court to be well settled that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but in order to render the settlement binding, one or other of these modes must, as I understand the law of this Court, be resorted to, *for there is no equity in this Court to perfect an imperfect gift.* The cases, I think, go further to this extent, that *if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes.* If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be effectual by being converted into a perfect trust" (*m*).

(*l*) (1862), 4 De G. F. & J. 274.

(*m*) See also *Richards* v. *Delbridge* (1874), 18 Eq. 14; *Re Williams*, *Williams* v. *Ball*, [1917] 1 Ch. 1.

Promise to give.

A promise to make a gift in the future does not amount to a gift, and is merely *nudum pactum* (*n*).

Infants.

An infant can accept a gift (*o*), but he can repudiate it when he comes of age (*p*). A common example of the right of an infant to repudiate a gift on his attaining twenty-one is afforded by the transfer to or purchase in the name of an infant of shares in a company. He can repudiate them on attaining twenty-one, and if the company is wound up before that event happens his transferor remains liable for calls (*q*).

Gifts on condition.

A gift may be made subject to a condition precedent (*r*) or to a condition subsequent. Gifts subject to conditions subsequent must be carefully distinguished from gifts for a particular purpose. Gifts of the latter class take effect even if the purpose becomes incapable of being performed.

A common example of a gift being liable to be defeated by a condition subsequent is that of presents made by a man to a woman to whom he is betrothed (*s*), such as an engagement ring, in which case, if the marriage is broken off, the presents must be returned.

An example of the rule that a gift is not defeated by the failure of the purpose for which it is made is afforded by *Leche* v. *Kilmorey* (*t*), where A. paid a sum to an army agent to the account of N. "to be at his disposal for the use of L." The sum was really intended by the donor to be applied in purchasing promotion for L. At the death of A. the money still remained in the hands of the army agent. Afterwards L. was obliged, from his

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(*n*) *Shower* v. *Pilck* (1849), 4 Ex. 478; *Re Ridgway* (1885), 15 Q. B. D. 449; *Re Innes* (1910), 101 L. T. 633.

(*o*) *Hunter* v. *Westbrook* (1827), 2 C. & P. 578; *Haynes's Case* (1613), 12 Rep. 113; *The Wardens of the Minor Brothers of London* (1410), Y. B. 11 Hen. 4, 31.

(*p*) Co. Litt. 2*b*.

(*q*) *Weston's Case* (1870), 5 Ch. 614; *Mann's Case* (1868), 3 Ch. 459; *Curtis's Case* (1868), 6 Eq. 455.

(*r*) *Lyte* v. *Peny* (1542), Dyer, 49*a* (7); *Re Whittaker* (1882), 21 Ch. D. 657.

(*s*) *Young* v. *Burrell*, Cary (1557—1604), 77; *Robinson* v. *Cumming* (1742), 2 Atk. 409; *Jacobs* v. *Davis*, [1917] 2 K. B. 532.

(*t*) (1823), Turn. & Russ. 207; 24 R. R. 19.

bad health, to leave the army, but it was held that he was entitled to the money.

Gifts by deed.

A gift of specific chattels by deed (*u*) vests the chattels in the donee without delivery of them to him, subject, of course, to his right to refuse the gift (*v*). "If the deed be delivered to the use of the donee, the goods and chattels are in the donee presently before notice or agreement; but the donee may make refusal *in pais*, and by that the property and interest will be divested" (*w*). It is now settled that, "although a donee may dissent from and thereby render null a gift to him, yet a gift to him of property, whether real or personal, by deed, vests the property in him subject to his dissent" (*x*). Acceptance is presumed until dissent is signified, even though the donee is not aware of the gift (*y*).

Acceptance presumed until dissent.

Creditors' deed.

The cases (*z*) which show that a voluntary assignment made by a debtor to a trustee for his creditors is revocable by the grantor until it has been communicated to a creditor, are not authorities for the proposition that a gift by deed is revocable until it is communicated to the donee. The distinction between the two cases is obvious. In the case of the creditors' deed, the debtor is merely directing how his own property is to be applied for his own benefit (*a*). The deed has merely the same effect as if the debtor had delivered money to an agent to pay his creditors, in which case the debtor might, before payment or communication by the agent to the creditors, change his mind and recall the money: in the case of a gift, the effect of the deed is actually to

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(*u*) It may be a bill of sale within the meaning of the Bills of Sale Acts; *post*, Chap. VI.

(*v*) Y. B. 7 Edw. 4, 20, pl. 21.

(*w*) *Butler and Baker's Case* (1591), 3 Rep. 26*b*, 27*a*.

(*x*) *Per* Lindley, L.J., *Standing* v. *Bowring* (1886), 31 Ch. D. 290. Where the gift is of land to an infant after 1925, see L. P. Act, 1925, s. 19, and S. L. Act, 1925, s. 27 (1).

(*y*) *Per* Lindley, L.J., *London and County Bank* v. *London and River Plate Bank* (1888), 21 Q. B. D. 541.

(*z*) Collected in *Siggers* v. *Evans* (1855), 5 E. & B. 367.

(*a*) See *Acton* v. *Woodgate* (1833), 2 My. & K. 492; 39 R. R. 251; *Johns* v. *James* (1878), 8 Ch. D. 744.

change the ownership of the property for the benefit of the donee (*b*).

The operation of a deed is not suspended by its being suppressed or destroyed by the donor, or by its not being communicated to the donee; and it may be good as between the donor and donee without notice to trustees, which may be necessary to render it good against third parties (*c*). The deed must, of course, be one which is effective to pass the property in law or equity (*d*).

Parol gift—delivery is necessary.

The question whether a gift of a corporeal chattel in the possession of the donor can be made without delivery, *per verba de præsenti*, or by the expression of the intention of the parties, as evidenced by their acts, has been the subject of much controversy (*e*). It has, however, been decided by the Court of Appeal (*f*), in accordance with *Irons* v. *Smallpiece* (*g*), that delivery is essential (*h*). Fry and Bowen, L.JJ. (*i*), in their judgment said :—

> "According to the old law no gift or grant of a chattel was effectual to pass it either by parol or by deed, and whether with or without consideration, unless accompanied by delivery. On that law two exceptions have been grafted, one in the case of deeds and the other in that of contracts of sale where the intention of the parties is that the property shall pass before delivery; but as regards gifts by parol the old law was in force when *Irons* v. *Smallpiece* was decided; that case, therefore, correctly declared the existing law."

Lord Esher, M.R., said :—

> "In ordinary English language, and in legal effect, there cannot be a gift without a giving and taking. The giving and taking are the two contemporaneous reciprocal acts which constitute a gift. They are a necessary part of the proposition that there has been a gift. They are not evidence to prove that there has been a gift, but facts to be proved to constitute the proposition that there has been a gift" (*k*).

(*b*) *New* v. *Hunting*, [1897] 2 Q. B. 19; [1899] A. C. 419.

(*c*) Elph. N. & C. Interp. 120; *Standing* v. *Bowring* (1886), 31 Ch. D. 282; *post*, Chap. VIII.

(*d*) *Per* Grant, M.R., *Antrobus* v. *Smith* (1805), 12 Ves. 39; 8 R. R. 278.

(*e*) See *Re Harcourt* (1883), 31 W. R. 580; *Re Ridgway* (1885), 15 Q. B. D. 449.

(*f*) *Cochrane* v. *Moore* (1890), 25 Q. B. D. 57.

(*g*) (1819), 2 B. & Ald. 551; 21 R. R. 395.

(*h*) As to what amounts to delivery, see *ante*, p. 18.

(*i*) *Cochrane* v. *Moore*, *sup.*

(*k*) *Cochrane* v. *Moore*, *sup.*

There must be a delivery, transfer, or change of possession consequent upon the gift (*l*).

The word "contemporaneous," as used by Lord Esher, must probably be taken in the qualified meaning of "as part of the same transaction." There are some cases in which the intention of the donor to make the gift, the delivery to and the acceptance by the donee, take place at different times. For example, A. sends a book as a present to his son in India; the son is away from his house at the time when the book is delivered there, and does not know of the intended gift till he returns to his house. In this case acceptance follows delivery; but it may precede it, as where A. offers to give a specific chattel to B., B. accepts, and A. delivers it afterwards. Probably an offer by A. to give a specific chattel to B. when accepted by B. operates as a licence to B. to take that chattel peaceably wherever he may find it, and the taking of it by B. operates as delivery by A. so as to transfer the property in the chattel to B. The licence, however, is revocable until executed, and may be revoked by a communication to that effect made by A. to B., or by A.'s death, or probably by A.'s becoming insane (*m*).

Chattel in possession of bailee or trespasser.

Where a corporeal chattel is in the hands of a bailee or trespasser, the owner may wish to give it either to the person in whose possession it is, or to a stranger. In the former case, an expression of the intention of the owner to give the chattel to the person in whose possession it is, followed by acceptance of the gift, appears to be sufficient. In other words, a delivery, followed by a subsequent declaration of intention to give, has the same effect as a declaration of intention to give followed by delivery (*n*). Such is the common case of A. lending a

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(*l*) *Kilpin* v. *Ratley*, [1892] 1 Q. B. 582; ante, p. 19. See *Ramsay* v. *Margrett*, [1894] 2 Q. B. 18, *per* Lord Esher, M.R., and Davey, L.J.; and *Re Magnus*, [1910] 2 K. B. 1049; *Valier* v. *Wright and Bull* (1917), 33 T. L. R. 366.

(*m*) See this discussed, 6 Law Quarterly, 446; *Yonge* v. *Toynbee*, [1910] 1 K. B. 215.

(*n*) Y. B. 21 Edw. 4, 55, pl. 27; *Re Stoneham*, [1919] 1 Ch. 149.

book to B. and afterwards telling him that he may keep it (*o*).

The law as to gifts to trespassers (*i.e.*, persons who acquire possession wrongfully) is laid down in Sheppard's Touchstone (*p*) as follows :—

> "If a man take my goods from me, or from another man in whose hands they are; or I buy goods of another man and suffer them in his possession, and a stranger taketh them from him; it seems, in these cases, I may give the goods to the trespasser, because the property of them is still in me."
>
> Mr. Preston adds, "*i.e.*, his acceptance of them is an admission of property in the donor; but they cannot be given to a stranger, since without such an admission the party has merely a right of action or of resumption by recaption" (*q*).

If the chattel is in the hands of a third person the owner may make an effectual gift of it either by words of gift and such delivery and acceptance as the circumstances permit (*r*), or by constituting the third person a bailee for the donee with the assent of them both (*s*).

Gift of negotiable instrument.

The delivery of a negotiable instrument to the donee, indorsed if necessary by the donor, operates as a gift of the money secured by it if such be the intention (*t*).

There is, however, a distinction between a cheque drawn by the donor on his own bankers in favour of the donee and a cheque drawn by a stranger and given by the donor to the donee. The former is merely an order by the donor to his banker to pay the donee, and is revocable by the donor, and is revoked by his death at any time before payment (*u*). On the other hand, the

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(*o*) 6 L. Q. R. 449.

(*p*) Pp. 240, 241.

(*q*) This statement of the law appears to be founded on the Y. B. 6 Hen. 7, 8, pl. 4, and 10 Hen. 7, 27, pl. 13. In the latter case a man from whom goods were taken by a trespasser gave them to him, and it was held that the gift was good, and that even if it was not good as a gift it was good as a release, for chattels may be released without deed. The statement in *Jennor and Hardie's Case* (1587), 1 Leon. 283, pl. 383, that a release of a right in chattels cannot be without deed, appears from the context to be erroneous.

(*r*) *Rawlinson* v. *Mort* (1905), 93 L. T. 555; 21 T. L. R. 774.

(*s*) See *Cochrane* v. *Moore* (1890), 25 Q. B. D. 57.

(*t*) *McCulloch* v. *Bland* (1860), 2 Giff. 428; *Langley* v. *Thomas* (1857), 26 L. J. Ch. 609.

(*u*) See section 75, Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61).

delivery of a cheque drawn by a stranger passes the right to receive the money for which the cheque is drawn, and therefore operates as an effectual gift. But a negotiable instrument does not pass by words of gift without delivery (*v*).

Gift of instrument creating chose in action.

The mere delivery of an instrument which is not negotiable, such as a policy of insurance, bond, or share certificate, with the intention to make a gift of the money or share secured thereby, will not operate as a gift of the money or share unless accompanied by an effectual assignment of the chose in action. It has been held that the delivery of a banker's deposit receipt, indorsed by the donor with an order to pay the amount to the donee, is an effectual gift of the money deposited at the bank (*w*).

It must not, however, be assumed that the mere gift of the instrument has no effect. Coke says (*x*) :—

> "A man may give or grant his deed to another, and such a grant by parol is good. . . . If a man hath an obligation, though he cannot grant the thing in action, yet he may give or grant the deed, viz., the parchment and wax, to another, who may cancel and use the same at his pleasure."

Deeds.

The donee may often retain the instrument, though he cannot recover the debt; and in such cases the donor, or his representative, may be unable to recover the debt for want of the instrument (*y*). Where, however, an equitable mortgagee by deposit of deeds hands over the deeds to another by way of gift, the donee cannot retain them, because the donor had no interest in them apart from the charge, and could only transfer his interest in the deeds by properly transferring the charge (*z*).

Gift of instrument to debtor.

The gift to the debtor of an instrument creating a debt, after the debt is due, does not extinguish the

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(*v*) *Trimmer* v. *Danby* (1856), 25 L. J. Ch. 424; *Bridge* v. *Bridge* (1852), 16 Beav. 315.

(*w*) *Re Griffin*, [1899] 1 Ch. 408.

(*x*) Co. Litt. 232*a*, *b*.

(*y*) *Rummens* v. *Hare* (1876), 1 Ex. D. 169; *Barton* v. *Gainer* (1858), 3 H. & N. 387.

(*z*) *Re Richardson* (1885), 30 Ch. D. 396.

debt (*a*). In the case of a bill or note, however, either a written renunciation, or a verbal renunciation and delivery of the bill or note to the acceptor or maker, discharges the debt (*b*).

Cancellation.

The cancellation of an instrument evidencing a debt is *prima facie* evidence of a release (*c*). The intentional cancellation of a bill or note, or of the signature of a party thereto, by the holder discharges the bill or note or the party whose signature is cancelled (*d*).

Forgiveness of debt.

Except as above, the mere fact of a creditor forgiving a legal debt, either by word of mouth (*e*), or by writing not under seal (*f*), does not discharge the debtor. If the debt, being a simple contract debt, is not due, the contract might at law be rescinded by a new simple contract, but forgiveness cannot amount to a contract; if the debt is due, it can only be released by deed, or by simple contract made upon an executed consideration by way of accord and satisfaction (*g*). Mere forgiveness will not suffice, because the defence to an action for the recovery of the debt could at most be equitable only (*h*), and equity will not assist a volunteer. But, if the debt is gone at law, as where the debtor is appointed executor of the creditor, so that he requires no assistance from equity, the forgiveness operates as a release in equity and at law (*i*).

Release of debt by conduct.

Whether the instrument creating the debt is under seal or not, the conduct of the parties may amount to a release of the debt (*k*).

(*a*) *Edwards* v. *Walters*, [1896] 2 Ch. 157, 168.

(*b*) Bills of Exchange Act, 1882, ss. 62, 89; *post*, Chap. X.

(*c*) *Pigot's Case* (1614), 11 Rep. 26 b; *Gilbert* v. *Wetherell* (1825), 2 Sim. & S. 254; 25 R. R. 203.

(*d*) Bills of Exch. Act, 1882, ss. 63, 89.

(*e*) *Flower's Case*, Noy (1559—1642), 67.

(*f*) But consider *Eden* v. *Smyth* (1801), 5 Ves. 356; 5 R. R. 60, where it was considered that a bond debt might be released by a letter.

(*g*) Leake on Contracts, Part IV, Chap. 8.

(*h*) *Cross* v. *Sprigg* (1849), 6 Ha. 552; *Peace* v. *Hains* (1853), 11 Ha. 151.

(*i*) *Strong* v. *Bird* (1874), 18 Eq. 315; *Re Applebee*, [1891] 3 Ch. 422; *Re Pink*, [1912] 2 Ch. 528.

(*k*) *Flower* v. *Marten* (1837), 2 My. & Cr. 459; 45 R. R. 114;

Assignment under s. 25 of Judicature Act and s. 136 of Law of Property Act, 1925.

The provision of the Law of Property Act, 1925, s. 136, which repeals and re-enacts sub-s. 6 of s. 25 of the Judicature Act, 1873 (*l*), that "any absolute assignment by writing under the hand of the assignor . . . of any debt or other legal chose in action of which express notice in writing shall be given to the debtor . . . shall be effectual at law . . . to pass and transfer the legal right to such debt or chose in action from the date of such notice . . ." applies to a voluntary transfer (*m*).

Chose in action transferable in statutory mode.

A gift of a *chose in action* which is transferable in a statutory manner only is not effectual unless the transfer is made in the statutory manner (*n*).

Imperfect gift, and donee made executor.

A gift which is imperfect for want of a necessary delivery or transfer will be perfected on the death of the donor if the donee is appointed an executor, for the property then legally vests in the executor (*o*).

Gift of equitable interest in property by way of trust.

It is possible to make a valid gift of the equitable interest in property of any nature by means of a trust. If the donor has the legal interest he may constitute himself a trustee for the donee, or transfer the legal interest to some other person as a trustee for the donee. If the donor has the equitable interest only, he can cause the holder of the legal interest to constitute himself a trustee for the donee. The cases are conflicting, but the following conclusions may be drawn from them:—

First. Where the donor attempts to make a gift by transfer of the property to the donee which fails owing to the transfer being ineffectual, he does not thereby

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Yeomans v. *Williams* (1865), 35 Beav. 130; 1 Eq. 184; *Edwards* v. *Walters*, [1896] 2 Ch. 157, 168.

(*l*) 36 & 37 Vict. c. 66. See *post*, Chap. VIII.

(*m*) *Re Westerton*, [1919] 2 Ch. 104.

(*n*) *Colman* v. *Sarrel* (1789), 1 Ves. 50; 3 Bro. C. C. 12; 1 R. R. 83; *Beech* v. *Keep* (1854), 18 Beav. 285 (where consols were assigned by deed); *Coningham* v. *Plunkett* (1843), 2 Y. & C. C. C. 245; *Peckham* v. *Taylor* (1862), 31 Beav. 250 (where a power of attorney for the transfer of stock was executed, but no transfer made during the donor's life); see also *Antrobus* v. *Smith* (1805), 12 Ves. 39; 8 R. R. 278; *Moore* v. *Moore* (1874), 18 Eq. 474; *Milroy* v. *Lord* (1862), 4 De G. F. & J. 264.

(*o*) *Re Stewart*, [1908] 2 Ch. 251; *Re Innes* (1910), 101 L. T. 633, where it was held that a mere promise to give was not thus made effectual.

constitute himself a trustee. A Court of Equity will not construe an imperfect gift as a trust (*p*).

Secondly. The owner of property may constitute himself (*q*) or a stranger (*r*) a trustee for a donee by unequivocal words or acts showing clearly the intention to create a trust (*s*).

Thirdly. Where A., the legal owner of property, attempts to make a gift to B. by transferring it to C. in trust for B., the gift fails if the transfer is incomplete (*t*).

Fourthly. Where A. is the equitable owner of property legally vested in C., a direction by A. to C. to hold the property in trust for B. (assented to by C.) operates as an effectual gift in equity to B. (*u*).

Law of Property Act, 1925, s. 53.

It must be remembered, however, that the Law of Property Act, 1925 (s. 53), repealing and substantially re-enacting the provisions of sects. 7-9 of the Statute of Frauds (*v*) enacts that " a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will " (*w*), and that " a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will " (*x*).

(*p*) See *Milroy* v. *Lord*, *Richards* v. *Delbridge*, and *Re Williams* cited, *sup.*, p. 101.

(*q*) *Ex p. Pye* (1811), 18 Ves. 140; 2 W. & T. L. C. (ed. 9), 314; 11 R. R. 173; *Wheatley* v. *Purr* (1837), 1 Keen, 551; *Thorpe* v. *Owen* (1843), 5 Beav. 224; *Gray* v. *Gray* (1852), 2 Sim. (N.S.) 273.

(*r*) *Peckham* v. *Taylor* (1862), 31 Beav. 250; *Stapleton* v. *Stapleton* (1844), 14 Sim. 186; *Vandenberg* v. *Palmer* (1858). 4 K. & J. 204.

(*s*) No trust was constituted in *Gaskell* v. *Gaskell* (1836), 2 Y. & J. 502; *Field* v. *Lonsdale* (1850), 13 Beav. 78; *Peckham* v. *Taylor*, *sup.*; *Jones* v. *Lock* (1865), 1 Ch. 25; *Penfold* v. *Mould* (1867), 4 Eq. 562.

(*t*) See per Romilly, M.R., *Bentley* v. *Mackay* (1851), 15 Beav. 18.

(*u*) *Kekewich* v. *Manning* (1851), 1 De G. M. & G. 176; *Villers* v. *Beaumont* (1682), 1 Vern. 100; *Ellison* v. *Ellison* (1802), 6 Ves. 656; 2 W. & T. L. C. (ed. 9), 782; 6 R. R. 19; *Bentley* v. *Mackay*, *sup.*; *Harding* v. *Harding* (1886), 17 Q. B. D. 442.

(*v*) 29 Car. 2, c. 3.

(*w*) Law of Property Act, 1925, s. 53 (1) (b), *ante*, p. 11.

(*x*) *Ib.* s. 53 (1) (c).

This does not affect the creation or operation of resulting, implied or constructive trusts (*y*).

Writing unnecessary when there is fraud.

These provisions do not, however, prevent proof of a fraud, and it is a fraud for a person to whom property is transferred as a trustee to claim the property as his own, and in such a case the trust may be proved by oral evidence when there is not a writing sufficient to satisfy the statute (*z*).

The same principle is applied to gifts in a will, and although, on the face of the will, a legacy may be given absolutely, evidence is admissible to show that during the testator's lifetime he communicated to the legatee his intention that the gift was to be held on trust. If the trust indicated by the testator is not illegal, it will be enforced; otherwise the property will go to the persons entitled on intestacy (*a*).

Purchase in name of stranger.

Where a man purchases property, or invests money, in the name of a stranger, or in the name of a stranger jointly with himself, the presumption is that he makes the purchase or investment for his own benefit, and that it is to be held on trust for him (*b*). On the other hand, if he purchases property in the name of a person for whom he is morally bound to provide, *e.g.*, his wife or child, the presumption is that he intends the purchase to discharge in whole or in part his moral obligation; but in either case evidence is admissible to rebut the presumption (*b*).

In the opinion of Courts of Equity a father is morally bound to provide for his children, and a husband for his wife (*c*); but if it is alleged that a person standing in any other relation to another is morally bound, as being *in loco parentis*, to support him, the existence of the obligation must be proved (*d*).

(*y*) *Ib.* s. 53 (2). See *Dyer* v. *Dyer* (1788), 2 W. & T. L. C. (ed. 9), 749. (*z*) *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196.

(*a*) Theobald on Wills, Chap. X.

(*b*) *Dyer* v. *Dyer*, *supra*; *Standing* v. *Bowring* (1886), 31 Ch. D. 287, *per* Cotton, L.J.; *Re Policy* 6402 *of Scottish, &c. Soc.*, [1902] 1 Ch. 282. See *Gascoigne* v. *Gascoigne*, [1918] 1 K. B. 223.

(*c*) See *Marshall* v. *Crutwell* (1875), 20 Eq. 328.

(*d*) *Per* Jessel, M.R., *Bennet* v. *Bennet* (1879), 10 Ch. D. 476.

Father and child.

It follows that if a father makes a purchase in the name of a child (*e*), or in the names of the child and another person (*f*), or in the names of the child and himself (*g*), the purchase is considered to be for the child's benefit. It may, however, appear, either from evidence of the father's declarations or conduct, contemporaneous with but not after the purchase (*h*), or by the acts or declarations of the child after the purchase (*i*), or by the circumstances attending the transfer, that the child was merely a trustee for his father.

Mother and child.

On the other hand, as a mother hitherto, as such, has not been considered by Courts of Equity to be morally bound to provide for her children, a transfer to, or a purchase in the name of, a child by its mother is *prima facie* not a gift to the child (*k*); but circumstances may readily (*l*) show that it was a gift (*m*).

Purchases in the name of a grandchild whose father was dead (*n*), and in the name of a wife's nephew whose father was alive (*o*), were held under the circumstances to be made by a person who was morally bound to support the person in whose name the purchase was made as being *in loco parentis* to him, and therefore to amount to a gift.

Husband and wife.

Until recently a gift by a husband to his wife had no effect at law, though equity would give effect to it as

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(*e*) *Elliot* v. *Elliot* (1677), 2 Ch. Ca. 231; *May* v. *May* (1863), 33 Beav. 81.

(*f*) *Lamplugh* v. *Lamplugh* (1709), 1 P. Wms. 111; *Crabb* v. *Crabb* (1834), 1 My. & K. 511.

(*g*) *Scroope* v. *Scroope* (1663), 1 Ch. Ca. 27; *Back* v. *Andrews* (1690), Finch, Pre. Ch. 1.

(*h*) *Elliot* v. *Elliot*, *sup.*; *Sidmouth* v. *Sidmouth* (1840), 2 Beav. 447; 50 R. R. 235; *Stock* v. *McAvoy* (1872), 15 Eq. 55; *Collinson* v. *Collinson* (1853), 3 De G. M. & G. 409; *Childers* v. *Childers* (1857), 1 De G. & J. 482.

(*i*) *Sidmouth* v. *Sidmouth* (1840), 2 Beav. 445; 50 R. R. 235.

(*k*) *Re De Visme* (1863), 2 De G. J. & S. 17; *Bennet* v. *Bennet* (1879), 10 Ch. D. 474; *Garrett* v. *Wilkinson* (1848), 2 De G. & Sm. 244.

(*l*) Per Jessel, M.R., *Bennet* v. *Bennet*, *sup.*

(*m*) *Sayre* v. *Hughes* (1868), 5 Eq. 376; *Batstone* v. *Salter* (1875), 19 Eq. 250; 10 Ch. 431.

(*n*) *Ebrand* v. *Dancer* (1680), 2 Ch. Ca. 26; *Soar* v. *Foster* (1858), 4 K. & J. 152.

(*o*) *Currant* v. *Jago* (1844), 1 Coll. 261.

raising a trust (*p*). Now, however, under the Law of Property Act, 1925 (s. 72), replacing a provision of the Conveyancing Act, 1881, to like effect, and the Married Women's Property Act, 1882, such a gift is effectual at law (*q*).

A purchase by a husband in the name of his wife, or in the joint names of the husband and wife (*r*), or in the names of the husband, wife, and a stranger (*s*), is presumed to be a gift to the wife, but this presumption may be rebutted (*t*). Wearing apparel bought by a wife for her personal use with money supplied by her husband for the purpose is *prima facie* a gift to her and her separate property (*u*). When a purchase is made with the wife's money in the name of a husband there is no presumption of a gift by the wife to the husband (*v*).

Purchase in name of stranger.

A purchase in the name of a stranger may be proved to be a gift by evidence of intention (*w*) or of circumstances (*x*).

Avoidance of gifts at instance of creditors.

Gifts made with intent to defraud creditors are voidable at the instance of any person thereby prejudiced (*y*). Gifts are also liable to be avoided on the bankruptcy of the donor (*z*).

(*p*) *Masson* v. *De Fries*, [1909] 2 K. B. 831; *Fox* v. *Hawks* (1880), 13 Ch. D. 822.

(*q*) 44 & 45 Vict. c. 41, s. 50; 45 & 46 Vict. c. 75; *Re Breton* (1881), 17 Ch. D. 416.

(*r*) *Christ's Hospital* v. *Budgen* (1712), 2 Vern. 683; *Dummer* v. *Pitcher* (1833), 2 My. & K. 262; 39 R. R. 203; *Dunbar* v. *Dunbar*, [1909] 2 Ch. 639.

(*s*) *Kingdon* v. *Bridges* (1688), 2 Vern. 67; *Re Eykyn* (1877), 6 Ch. D. 115.

(*t*) *Smith* v. *Warde* (1845), 15 Sim. 56; *Lloyd* v. *Pughe* (1873), 8 Ch. 88; *Devoy* v. *Devoy* (1857), 3 Sm. & Giff. 403. Wedding presents are separate estate of the wife: *Ex p. Pannell* (1889), 37 W. R. 464. See 1 Vaizey on Settlements, 760.

(*u*) *Masson* v. *De Fries*, *sup.*

(*v*) *Mercier* v. *Mercier*, [1903] 2 Ch. 98.

(*w*) *Standing* v. *Bowring* (1884-6), 27 Ch. D. 341; 31 Ch. D. 282; *Batstone* v. *Salter* (1875), 19 Eq. 250; 10 Ch. 431; *Fowkes* v. *Pascoe* (1875), 10 Ch. 343.

(*x*) *Re Curteis* (1872), 14 Eq. 217; *Ouseley* v. *Anstruther* (1847), 10 Beav. 461.

(*y*) Law of Property Act, 1925, s. 172, repealing and re-enacting 13 Eliz. c. 5.

(*z*) Bankruptcy Act, 1914, s. 42; *post*, Chap. XVII.

§ 2. *Donationes Mortis Causâ.*

A *donatio mortis causâ* (*a*) is where a man makes a gift in contemplation of his death from an existing illness or in some other contingency. The donor must intend the gift to be absolute after his death, and must not retain any dominion or control over the thing given (*b*). It is subject to a condition (which may be express or implied) that the thing given shall be returned to the donor if he survives, and is revoked by the death of the donee in the lifetime of the donor (*c*). It may also be revoked by the thing given being returned to the donor. But where the subject of the gift is merely returned to the donor for a special purpose not inconsistent with the gift, *e.g.*, for safe custody, the donor receiving it as bailee, the gift will not be affected (*d*). It is subject to the donor's debts (*e*). A *donatio mortis causâ* may be made for a particular purpose or subject to a trust (*f*). A gift which is intended to be an unconditional gift *inter vivos* will not be construed as a *donatio mortis causâ* (*g*).

Delivery necessary.

A *donatio mortis causâ* cannot be made by mere words nor by deed without delivery. It can only be made effectual by delivery (*h*). This does not mean that the delivery must be such as to confer a legal title on the donee, for in some cases the delivery of a document of title, which does not pass a legal interest,

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(*a*) The doctrine as to *donationes mortis causâ* is derived from the civil law. "Mortis causa donatio est quæ propter mortis fit suspicionem; cum quis ita donat, ut si quid humanitus ei contigisset, haberet is qui accepit: sin autem supervixisset, qui donavit, reciperet: vel si eum donationis pœnituisset: aut prior decesserit is, cui donatum sit:" Just. Instit. II. 7, 1. See *Ward* v. *Turner* (1752), 1 W. & T. L. C. (ed. 9) 341, and notes.

(*b*) *Solicitor to the Treasury* v. *Lewis*, [1900] 2 Ch. 812; *Re Johnson* (1905), 92 L. T. 357.

(*c*) *Tate* v. *Hilbert* (1793), 2 Ves. jun. 121; 2 R. R. 175.

(*d*) *Re Hawkins*, [1924] 2 Ch. 47.

(*e*) *Smith* v. *Casen*, cited *Drury* v. *Smith* (1718), 1 P. Wms. 406, n.; *Ward* v. *Turner*, *sup.*

(*f*) *Blount* v. *Burrow* (1792), 4 Bro. C. C. 73; *Hills* v. *Hills* (1841), 8 M. & W. 401; 58 R. R. 746.

(*g*) *Edwards* v. *Jones* (1836), 1 My. & Cr. 226; 43 R. R. 178; *ante*, p. 101.

(*h*) *Ward* v. *Turner*, *sup.*; *Bunn* v. *Markham* (1816), 7 Taunt. 224; 17 R. R. 497.

is held to confer an equitable interest on the donee, and the right to the assistance of the Court to make his title complete after the death of the donor (*i*). But the document must be of a nature essential to establish the title to the subject-matter of the gift, and not a mere symbol " which will not do " (*k*). Thus, delivery of receipts for the purchase-money of South Sea annuities (*l*), of certificates of Government stock (*m*), of railway stock (*n*), or of shares in a building society (*o*), has been held not sufficient to constitute a valid *donatio mortis causâ.*

Negotiable instruments.

Delivery of a negotiable instrument to the donee is sufficient, even if it requires indorsement and is not indorsed (*p*).

A *donatio* of a cheque drawn by the donor or the donor's own promissory note is ineffectual unless it be cashed (*q*) or dealt with for value (*r*) in his lifetime.

Delivery of the instrument creating a chose in action, such as a deposit note (*s*), is sufficient, and after the death of the donor the donee can sue in the name of his executors (*t*). The same rule has been applied to the delivery of a receipt which was the evidence of a loan (*u*), and of a Post Office Savings Bank deposit book (*x*).

(*i*) *Duffield* v. *Elwes* (1827), 1 Bli. (N.S.) 530; 30 R. R. 69; *Re Dillon* (1890), 44 Ch. D. 76; *Re Richards, Jones* v. *Rebbeck*, [1921] 1 Ch. 513.

(*k*) *Per* Hardwicke, C., *Ward* v. *Turner*, *sup.*

(*l*) *Ward* v. *Turner*, *sup.*

(*m*) *Re Andrews*, [1902] 2 Ch. 394.

(*n*) *Moore* v. *Moore* (1874), 18 Eq. 474.

(*o*) *Re Weston*, [1902] 1 Ch. 680.

(*p*) *Veal* v. *Veal* (1859), 27 Beav. 303; *Re Mead* (1880), 15 Ch. D. 651; *Clement* v. *Cheesman* (1884), 27 Ch. D. 631.

(*q*) *Hewitt* v. *Kay* (1868), 6 Eq. 198; *Re Mead, sup.; Re Beaumont*, [1902] 1 Ch. 889; *Re Davis* (1902), 86 L. T. 889; *Re Leaper*, [1916] 1 Ch. 579.

(*r*) *Rolls* v. *Pearce* (1877), 5 Ch. D. 730. Dealing with the cheque for value would seem to be the same thing as cashing it at the donor's bank.

(*s*) *Re Dillon* (1890), 44 Ch. D. 76; *Hudson* v. *Spencer*, [1910] 2 Ch. 285; *Re Hudson*, [1911] 1 Ch. 206.

(*t*) *Snellgrove* v. *Baily* (1744), 3 Atk. 214; *Gardner* v. *Parker* (1818), 3 Mad. 184; 18 R. R. 213; *Amis* v. *Witt* (1862), 33 Beav. 619; *Witt* v. *Amis* (1862), 1 B. & S. 109.

(*u*) *Moore* v. *Darton* (1851), 4 De G. & Sm. 517.

(*x*) *Re Weston*, [1902] 1 Ch. 680; *Re Andrews*, [1902] 2 Ch. 394.

Delivery up of a mortgage deed to the mortgagor, as a *donatio mortis causâ*, was held to be effectual to extinguish the mortgage debt, and the heir and executor of the mortgagee were held bound to give effect to it (*y*).

The delivery may be made to the donee or to a bailee for him (*z*); but delivery to the agent of the donor, with directions to deliver to the donee after the death of the donor, is not sufficient (*a*). There may, however, be a good *donatio mortis causâ* of a thing which has been previously delivered for a different purpose (*b*). Delivery of the key of a safe in which bonds were kept was held to effectuate a *donatio mortis causâ* of the bonds (*c*).

(*y*) *Duffield* v. *Hicks* (1827), 1 Dow. & Cl. 1; S. C., *Duffield* v. *Elwes* (1827), 1 Bli. (N.S.) 497; 30 R. R. 69; see *Re Dillon*, *sup.*

(*z*) *Powel* v. *Cleaver* (1789), 2 Bro. C. C. 499; *Re Korvine's Trust*, [1921] 1 Ch. 343.

(*a*) *Powell* v. *Hellicar* (1858), 26 Beav. 261; *Farquharson* v. *Cave* (1846), 2 Coll. 356.

(*b*) *Cain* v. *Moon*, [1896] 2 Q. B. 283; *Re Stoneham*, [1919] 1 Ch. 149.

(*c*) *Mustapha* v. *Wedlake*, [1891] W. N. 201; *Re Wasserberg*, [1915] 1 Ch. 195.

CHAPTER VI.

BILLS OF SALE.

"Bill of Sale."

THE expression "bill of sale" meant, originally, a document by which a transfer of ownership of personal chattels was effected in pursuance of a contract of sale. In modern times, however, it is used to indicate any instrument of transfer of personal chattels, whether by way of sale or otherwise, where possession of such chattels is not handed over to the transferee (*a*); and where there is valuable consideration for the transfer, the instrument need not be a deed (*b*).

It is usually associated with the notion of a mortgage, being most commonly used for that purpose, but it is not confined to mortgages, and there may be an absolute transfer of chattels by this means. The expression "bill of sale" in the modern Acts dealing with the subject, the Bills of Sale Acts, 1878 and 1882 (*c*), is extended to various kinds of documents evidencing a transfer of or charge upon personal chattels, where the possession of the chattels is still retained by the person giving the bill of sale. Hence there are two classes of bills of sale: (i) absolute, *i.e.*, purporting to be a complete transfer of the chattels by way of sale, gift, or settlement; and (ii) by way of mortgage, where there is a transfer for the purpose of creating a security, subject to a proviso for redemption on repayment of the money secured.

Mortgage and pledge distinguished.

A mortgage of chattels is to be distinguished from a pledge or pawn. In the case of a mortgage the

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(*a*) *Mills* v. *Charlesworth* (1890), 25 Q. B. D. 421, 424; [1892] A. C. 231; *Grigg* v. *National Guardian Assurance Co.*, [1891] 3 Ch. 206.

(*b*) *Flory* v. *Denny* (1852), 7 Ex. 581.

(*c*) *Post*, pp. 122 *et seq.*

property is transferred subject to a right of redemption. Under a pledge or pawn the *possession* only is given to the person who lends money on the security of the chattels, with a power of sale, express or implied, in case of default in payment of the debt (*cc*).

Where the bill of sale is by way of mortgage, the property passes to the grantee subject either to a condition making the transfer void on performance of the condition, as by the payment of money, or to a proviso entitling the grantor to redeem the property by such payment, and thereupon to have it reconveyed to him.

Apparent possession.

As a general rule, the property in chattels passes by delivery of possession, and the possession of such property is an apparent indication of ownership. If a purchaser or mortgagee of chattels allows them to remain in the possession of the vendor or mortgagor, the latter is enabled to appear to the world at large as the owner of the property, and to obtain credit as such (*d*); and on this ground it was held in many cases that transactions were fraudulent as against creditors, by virtue of the statute 13 Eliz. c. 5 (*e*). That Act avoids, as against creditors, any alienation of lands, goods, or chattels made with intent to delay, hinder, or defraud creditors; but the Act does not affect *bonâ fide* purchasers for value without notice (*f*).

13 Eliz. c. 5.

It is, however, now settled law that the retention of possession by the grantor of chattels is only evidence of fraud, and not conclusive proof of it (*g*): and there is this distinction to be observed between absolute sales and mortgages, that, on an absolute sale, the retention of possession by the vendor is *primâ facie* inconsistent with the nature of the transaction; whereas retention of possession by a mortgagor is consistent with a transaction

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(*cc*) See note (*a*), *ante*.

(*d*) See per Plumer, M.R.. *Dearle* v. *Hall* (1823), 3 Russ. 22; 27 R. R. 1.

(*e*) Repealed but re-enacted in substance by the Law of Property Act, 1925, s. 172; *Twyne's Case* (1601), 3 Rep. 80; 1 Sm. L. C. 1.

(*f*) See Law of Property Act, 1925, s. 172 (3).

(*g*) *Reed* v. *Wilmot* (1831), 7 Bing. 577; *Martindale* v. *Booth* (1832), 3 B. & Ad. 498; 37 R. R. 485.

of mortgage (*h*). It is sufficient for the security of a mortgagee that he should have a right to take possession of the mortgaged property upon default made by the mortgagor in performing his obligations under the bill of sale; and it was usual in mortgage bills of sale to provide expressly that until default the mortgagor should remain in possession.

Secret alienations of chattels.

If a transfer of chattels was made *bonâ fide*, and was not a contrivance to defraud creditors, it was unimpeachable under the 13 Eliz. c. 5, even where the transaction was secret and the grantor remained in possession of the chattels and appeared to the public to be their owner. Persons were thus enabled "to obtain fictitious credit, which their real circumstances did not warrant, by retaining apparent possession of goods, the ownership of which they had parted with to others, but which appeared to be really their own by remaining in their possession—a course of proceeding calculated to prejudice the honest creditor" (*i*). Where a debtor became bankrupt or insolvent, a remedy was provided by successive Bankruptcy Acts, which, in such cases, have made available, for the benefit of the debtor's creditors generally, all goods which were in his "possession, order, or disposition," in his trade or business, at the commencement of the bankruptcy, by the consent or permission of the true owner, [a term which was construed to include a mortgagee (*j*)], and of which the debtor was reputed owner (*k*).

Reputed ownership under Bankruptcy Acts.

Object of Bills of Sale Acts.

But, except as above mentioned, the danger to creditors of transfers of the property in personal chattels by secret bills of sale was not provided against until the

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(*h*) See per Buller, J., *Edwards* v. *Harben* (1788), 2 T. R. 587, 595; 1 R. R. 548.

(*i*) Per Cockburn, C.J., *Brantom* v. *Griffits* (1877), 2 C. P. D. 212, 214.

(*j*) *Ryall* v. *Rowles* (1749), 1 Ves. sen. 348; S. C., 1 W. & T. L. C. (ed. 9) 90. See *post*, Chap. XVII.

(*k*) Bankruptcy Act, 1914, s. 38 (*c*). See per Lord Fitzgerald, in *Colonial Bank* v. *Whinney* (1886), 11 App. Cas. 442. See also 2 Vaizey on Settlements, ch. 22, s. 5.

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year 1854, when the first Bills of Sale Act (*l*) was passed, the object being to destroy the secrecy of such transactions by requiring bills of sale to be recorded in a register, open to inspection on payment of a small fee, and by providing that, unless so registered, they should be void as against the general creditors on the bankruptcy or insolvency of the grantor and as against his execution creditors.

Lord Blackburn has given the following account of the causes which led to the enactments known as the Bills of Sale Acts (*m*) :—

> "At common law, a man might take a security upon goods without carrying away the goods or taking possession of them; he might take a sale of them out and out, and he might take the legal property in them subject to the power to redeem them (what is commonly called a mortgage) without taking possession of them. The law on the subject will be found in *Twyne's Case*, and the notes upon *Twyne's Case* (*n*). But this rule got established, that when the goods were not taken away but were left in the hands of the man who had had them previously, that which had been thought before to make the transaction void was really no more than evidence to go to the jury of fraud; and if a man came forward suddenly, when there was an execution, for instance, issued against the person in possession of the goods, and said, 'At an antecedent time I had a security upon these goods, and I left them in the possession of the debtor all that time,' the not having taken possession was evidence that the thing was a sham; it was not conclusive; it was not a matter of law; but it was evidence that the thing was a sham. Upon that two evils arose, and very important ones they were, In the first place, it often happened that there was really a sham put up to endeavour to defeat a man, and there was a great quantity of perjury, of fighting and expense, before it was proved to be a sham. That was a great evil. The other was that there were real honest transactions which were asserted to be shams when they were not, and in those cases there was apt to be much perjury and great expense before it was decided. For those reasons it was thought, and reasonably and properly so, that it was desirable to put a stop to this. That was the beginning of the series of Bills of Sale Acts, the first of which was passed in 1854."

Bills of Sale Act, 1854.

The preamble of the Bills of Sale Act, 1854 (*o*), sets

(*l*) 17 & 18 Vict. c. 36.
(*m*) *Cookson* v. *Swire* (1884), 9 App. Cas. 664.
(*n*) 1 Sm. L. C. 10.
(*o*) 17 & 18 Vict. c. 36.

forth that "frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances and possessed of property, and the grantees or holders of such bills of sale have the power of taking possession of the property of such persons, to the exclusion of the rest of their creditors."

The Act then proceeded to enact that every bill of sale (*p*) of personal chattels (*p*), whether absolute or conditional, whereby the grantee or holder should have power to seize or take possession of any property comprised therein, should be registered in the manner mentioned in the Act within twenty-one days after the making or giving of the bill of sale; and, if not so registered, should be void as against the grantor's assignees in bankruptcy or insolvency, and as against the assignees under any assignment for the benefit of his creditors, and as against all sheriff's officers and other persons seizing the effects in execution of any process against the grantor, so far as regarded personal chattels in the possession or apparent possession of the grantor. By an amending Act of 1866 (*q*), the registration was required to be renewed every five years.

Bills of Sale Acts, 1878, 1882. as to "personal chattels."

The Acts of 1854 and 1866 were repealed in 1878, and the law now in force is contained in the Bills of Sale Acts, 1878, 1882, 1890 and 1891 (*r*).

These Acts relate only to "personal chattels," which expression, according to the Act of 1878 (*s*), means :—

Definition of "personal chattels."

> "Goods, furniture, and other articles capable of complete transfer by delivery, and (when separately (*t*) assigned or charged) fixtures and growing crops."

(*p*) These terms are defined by sect. 7 of the Act.

(*q*) 29 & 30 Vict. c. 96.

(*r*) 41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43; 53 & 54 Vict. c. 53; 54 & 55 Vict. c. 35.

(*s*) Act of 1878, s. 4. Ships are not within the Act.

(*t*) See s. 7; *Roberts* v. *Roberts* (1884), 13 Q. B. D. 794, 806; *Re Armytage* (1880), 14 Ch. D. 379; *Re Yates* (1888), 38 Ch. D. 112; *Climpson* v. *Coles* (1889), 23 Q. B. D. 465; *Small* v. *Nat. Prov. Bank*, [1894] 1 Ch. 686; *Re Brooke*, [1894] 2 Ch. 600; *Johns* v. *Ware*, [1899] 1 Ch. 359.

But does not include (*u*) :—

Property exempted from Act.

"Chattel interests in real estate, nor fixtures (except trade machinery as hereinafter defined), when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, nor growing crops when assigned together with any interest in the land on which they grow, nor shares or interests in the stock, funds, or securities of any government, or in the capital or property of incorporated or joint stock companies, nor choses in action (*x*), nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement or of the custom of the country ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale."

Trade machinery.

"Trade machinery" is included in personal chattels for the purposes of the Act, and means "the machinery used in or attached to any factory or workshop," with certain specified exceptions (*y*). There is also a full definition of "factory or workshop" (*y*).

Bills of sale within Act.

The Act of 1878 applies to "every bill of sale . . . whereby the holder has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject" thereto (*z*).

The expression "bill of sale" is defined by the Act of 1878 (*a*) for the purposes of that Act; and the same definition is incorporated in the Act of 1882, subject to the qualification that the latter Act does not apply to bills of sale "given otherwise than by way of security for the payment of money" (*b*). It includes (*c*) :—

"Bills of sale" defined.

"Assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, and also any agreement (*d*), whether intended or

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(*u*) S. 4.

(*x*) *Re Thynne*, [1911] 1 Ch. 282.

(*y*) Act of 1878, s. 5.

(*z*) *Ib.* s. 3.

(*a*) *Ib.* s. 4.

(*b*) Act of 1882, s. 3.

(*c*) Act of 1878, s. 4.

(*d*) Not being an oral agreement; *Ex p. Hauxwell* (1883), 23 Ch. D. 626. See *Jarvis* v. *Jarvis* (1893), 69 L. T. 412; *Shears & Sons, Ltd.* v. *Jones*, [1922] 2 Ch. 802.

not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred."

The following documents are excluded from both Acts (*e*), namely:—

Documents excluded from Bills of Sale Acts.

"Assignments for the benefit of the creditors of the person making or giving the same (*f*), marriage settlements (*g*), transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling (*h*), bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse keepers' certificates, warrants or orders for the delivery of goods (*i*), or any other documents (*k*) used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented."

And (*l*)

"An instrument charging or creating any security on or declaring trusts of imported goods given or executed at any time prior to their deposit in a warehouse, factory, or store, or to their being re-shipped for export, or delivered to a purchaser not being the person giving or executing such instrument."

Attornment clauses and powers of distress.

The Act of 1878 further provides (*m*) that every attornment, instrument, or agreement (not being a mining lease (*n*)) whereby a power of distress is given by way of security for any debt or advance, and whereby any rent is made payable as a mode of providing for payment of interest on such debt or advance, shall be

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(*e*) 41 & 42 Vict. c. 31, s. 4; 45 & 46 Vict. c. 43, s. 3.

(*f*) *I.e.*, of *all* the creditors; *Boldero* v. *London and Westminster Loan Co.* (1879), 5 Ex. D. 47; *Hadley* v. *Beedom*, [1895] 1 Q. B. 646.

(*g*) This includes informal ante-nuptial agreements for a settlement; *Wenman* v. *Lyon*, [1891] 1 Q. B. 634, 2 *id.* 192; and a conveyance of chattels made in pursuance of a covenant to settle after-acquired property contained in an ante-nuptial settlement; *Re Reis*, [1904] 2 K. B. 769; but a post-nuptial settlement must be registered; *Ashton* v. *Blackshaw* (1870), 9 Eq. 510.

(*h*) See *Stephenson* v. *Thompson*, [1924] 2 K. B. 240.

(*i*) *Grigg* v. *National, &c. Co.*, [1891] 3 Ch. 206.

(*k*) *Re Hamilton, Young & Co.*, [1905] 2 K. B. 772.

(*l*) The Bills of Sale Act, 1891 (54 & 55 Vict. c. 35), amending the Bills of Sale Act, 1890 (53 & 54 Vict. c. 53). See *Re Hamilton, Young & Co.*, *sup.*

(*m*) S. 6.

(*n*) See *Re Roundwood Co.*, [1897] 1 Ch. 373.

deemed to be a bill of sale, within the meaning of the Act, of any personal chattels which may be seized or taken under such power of distress (*o*). This provision does not, however, extend "to any mortgage of any estate or interest in any land . . . which the mortgagee, being in possession, shall have demised to his mortgagor as his tenant at a fair and reasonable rent" (*oo*). It does not apply to the landlord's power of distraining for rent under an ordinary lease (*p*); but it does apply to an attornment clause in a mortgage of real property, so as to invalidate the power of distress (*p*). But it does not render the clause void so as to destroy the relation of landlord and tenant created thereby, and consequently a mortgagee under a mortgage deed containing an attornment clause may claim possession in case of default by a writ specially indorsed under Order III, rule 6, of the R. S. C., and final judgment for possession may be obtained under Order XIV (*q*).

The Law of Property Act, 1925, also expressly declares, setting at rest doubts which had formerly existed on the point, that a power of distress given by way of indemnity against a rent or against the breach of any covenant or condition in relation to land, is not a bill of sale within the Bills of Sale Acts, 1878 and 1882 (*r*).

What constitutes a bill of sale.

A document, to be a bill of sale to which the Acts apply, must be a document on which the title of the transferee of the chattels depends, that is, one by which it is intended that the ownership shall be practically changed or a right to take possession conferred (*s*). The

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(*o*) See *Pulbrook* v. *Ashby* (1887), 56 L. J. Q. B. 376; *Stevens* v. *Marston* (1890), 60 *id.* 192; *Re Roundwood Co.*, *sup.*

(*oo*) See note (*m*), *ante.*

(*p*) *Re Willis* (1888), 21 Q. B. D. 384, 394; *Green* v. *Marsh*, [1892] 2 Q. B. 330; *Re Roundwood Co.*, *sup.*

(*q*) *Mumford* v. *Collier* (1890), 25 Q. B. D. 279. (*r*) S. 189 (1).

(*s*) *Ex p. Hubbard* (1886), 17 Q. B. D. 690; *North Central Co.* v. *M. S. & L. R. Co.* (1886), 35 Ch. D. 191; 13 App. Cas. 554; *Mills* v. *Charlesworth*, [1892] A. C. 231; *Ramsay* v. *Margrett*, [1894] 2 Q. B. 18; *Morris* v. *Delobbel-Flipo*, [1892] 2 Ch. 352; *Hopkins* v. *Gudgeon*, [1906] 1 K. B. 690; *G. E. R. Co.* v. *Lord's Trustee*, [1909] A. C. 109; *Wrightson* v. *M'Arthur and Hutchinson's, Lim.*, [1921]

fact that the whole transaction is reduced into writing does not of itself make the document a bill of sale so as to avoid the transaction, though under such circumstances it may be necessary to produce the document in order to prove the transaction (*s*). If the title of the transferee is the result of an independent transaction, and the document is intended to be neither an instrument of transfer nor a record of the transaction, the document is not a bill of sale (*s*).

The criterion for determining whether a document accompanying a sale is a bill of sale within the Acts was thus expressed by Cotton, L.J., in *Marsden* v. *Meadows* (*t*).

"A document to be a bill of sale to which the Act applies, must be one on which the title of the transferee of the goods depends, either as the actual transfer of the property or an agreement to transfer, or as a muniment or document of title taken at the time as a record of the transaction."

An agreement, in an ordinary building contract, that all building and other materials brought by the builder upon the land shall become the property of the landowner, is not a bill of sale (*u*); but a mortgage of land and buildings in course of erection thereon, which gives the mortgagee power, on default by the mortgagor, to seize and sell materials, is a bill of sale (*x*).

Hire-purchase agreements.

The Acts relate to assurances, assignments, or rights to seize given or conferred by the person who owns the property (*y*). Therefore a hire-purchase agreement, under which the property in the goods does not pass until final payment and the seller has a right to retake possession on default in payment, is not a bill of sale (*y*). Where, however, the owner of goods purports to sell or

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2 K. B. 807; *National Provincial and Union Bank of England* v. *Lindsell*, [1922] 1 K. B. 21; *French* v. *Gething*, [1922] 1 K. B. 236.

(*t*) (1881), 7 Q. B. D. 80.

(*u*) *Reeves* v. *Barlow* (1884), 12 Q. B. D. 436.

(*x*) *Climpson* v. *Coles* (1889), 23 Q. B. D. 465.

(*y*) *McEntire* v. *Crossley*, [1895] A. C. 457; *Ex p. Crawcour* (1878), 9 Ch. D. 419.

assign them to another, and then enters into a hire-purchase agreement under which the goods are again to become his property on payment of the agreed amount, the Court will inquire into the real nature of the transaction and decide accordingly whether the document is or is not a bill of sale (z).

A good example is the case of *Mellor's Trustee* v. *Maas & Co.* (a). Mellor, who had contracted to purchase an hotel with the furniture therein, being unable to pay the purchase-money in full, applied to Maas & Co., a firm of wine merchants, for a loan of £2,000 on mortgage. The latter refused to make the loan on mortgage of the hotel, which was already subject to a mortgage, but an arrangement was made under which Maas & Co. were to purchase the furniture from the vendor of the hotel for £2,000 and then let it to Mellor under a hire-purchase agreement, for the sum of £2,412, payable by instalments, the furniture not to become the property of Mellor until all instalments were paid. Maas & Co. then paid the vendor for the furniture and let it to Mellor on hire-purchase in accordance with the arrangement, the hiring agreement containing a licence to seize the furniture in certain events. The purchase of the hotel was completed and Mellor took possession. Subsequently, Maas & Co. seized the furniture on default being made, and Mellor became bankrupt. The trustee in Mellor's bankruptcy claimed the furniture, on the ground that the transaction was really a loan upon the security of the hire-purchase agreement, and that the agreement was void as against the creditors for want of registration as a bill of sale. It was held that the sale of the furniture to Maas & Co. was only colourable and in effect an expedient to secure a loan of £2,000. They were really trustees for Mellor and had no title to the furniture, except through the hire-purchase agreement, which was therefore in the nature of a security and void against Mellor's trustee in bankruptcy for want of registration.

(z) *Re Watson* (1890), 25 Q. B. D. 27; *Madell* v. *Thomas*, [1891] 1 Q. B. 230; *Beckett* v. *Tower Co.*, *id.* 638; *Mellor's Trustee* v. *Maas & Co.*, [1903] 1 K. B. 226, affirmed on appeal *sub nom. Maas* v. *Pepper*, [1905] A. C. 102; *Johnson* v. *Rees* (1915), 84 L. J. K. B. 1276.

(a) [1903] 1 K. B. 226.

Attestation.

Every bill of sale to which the Acts apply must be duly attested and registered (*b*). In the case of bills of sale under the Act of 1878, the attestation must be by a solicitor, and it must state that, before the execution of the bill of sale, its effect was explained to the grantor by the solicitor (*c*). This provision as to attestation has been repealed, by the Act of 1882, as to bills of sale given as security for the payment of money (*d*), but still applies to all bills of sale which are within the Act of 1878 and not within that of 1882 (*e*). Bills of sale within the Act of 1882 must be attested by a credible witness not a party thereto (*f*).

Registration.

Registration is effected by presenting to the Registrar, at the Central Office of the Supreme Court, the bill of sale, together with a true copy thereof and an affidavit of the time of the bill being made or given, and of its due execution and attestation, and a description of the residence and occupation of the grantor and of every attesting witness, and by filing with him the copy and affidavit (*g*). This must be done within seven days of the execution thereof, or, if executed out of England, within seven days of the time at which it would in ordinary course arrive in England if posted immediately after execution (*h*). The registration must be renewed once at least every five years or it will become void (*i*). A transfer or assignment of a registered bill need not be

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(*b*) Act of 1878, s. 8; Act of 1882, s. 8.

(*c*) Act of 1878, s. 10 (1); *Casson* v. *Churchley* (1884), 53 L. J. Ch. 335.

(*d*) Act of 1882, s. 10.

(*e*) *Swift* v. *Pannell* (1883), 24 Ch. D. 210; *Casson* v. *Churchley*, *sup.*; *Heseltine* v. *Simmons*, [1892] 2 Q. B. 547.

(*f*) Act of 1882, s. 10.

(*g*) Act of 1878, ss. 10, 12; R. S. C. Ord. LXI. rr. 1, 25—27.

(*h*) 1878 Act, ss. 8, 10; 1882 Act, ss. 8, 11, 15.

(*i*) 1878 Act, s. 11.

registered (*j*), unless it is in effect the creation of a new security, *e.g.*, to secure a larger sum (*k*). If, by inadvertence, a bill of sale is not duly registered or re-registered, a judge of the High Court may extend the time for registration or order the registration to be amended, but not so as to affect the vested rights of third parties (*l*). Priority is given in the order of the date of registration (*m*).

Defeasance, condition, or declaration of trust.

Any defeasance, condition, or declaration of trust, subject to which a bill of sale is given, must, if not contained in the body thereof, be written on the same paper therewith before registration and be set out in the copy filed on registration, otherwise the registration will be void (*n*).

Statement of consideration.

The Act of 1878 requires that a bill of sale "shall set forth the consideration" for which it was given (*o*); and the Act of 1882 contains the same provision with the addition of "truly" before "set forth" (*p*). The effect of both is the same (*q*). It is sufficient if the statement of the consideration is substantially accurate, if its true legal effect or its true business effect is stated (*r*). For instance, if a bill of sale is given to secure an existing debt, the consideration may be stated as money "now paid" to the grantor (*s*).

Effect of non-compliance with above provisions, under—Act of 1878;

If the provisions as to attestation, registration, and statement of the consideration are not complied with, a bill of sale within the Act of 1878 is void only as against the trustee in bankruptcy, or the trustee of an assign-

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(*j*) *Ib.* ss. 10, 11. See *Ex p. Turquand* (1885), 14 Q. B. D. 636.

(*k*) *Marshall and Snelgrove* v. *Gower*, [1923] 1 K. B. 356.

(*l*) *Ib.* s. 14. See *Re Parsons*, [1893] 2 Q. B. 122.

(*m*) *Ib.* s. 10.

(*n*) *Ib.* s. 10 (3); *Counsell* v. *L. & W. Loan Co.* (1887), 19 Q. B. D. 512; *Edwards* v. *Marcus*, [1894] 1 Q. B. 587; *Ellis* v. *Wright* (1897), 76 L. T. 522; *Thomas* v. *Searles*, [1891] 2 Q. B. 408; *Heseltine* v. *Simmons*, [1892] 2 Q. B. 547.

(*o*) *Ib.* s. 8.

(*p*) 1882 Act, s. 8.

(*q*) *Richardson* v. *Harris* (1889), 22 Q. B. D. 268, 274.

(*r*) *Credit Co.* v. *Pott* (1881), 6 Q. B. D. 295; *Darlow* v. *Bland*, [1897] 1 Q. B. 125; *Stott* v. *Shaw & Lee, Ltd.*, [1928] W. N. 79. See Davidson's Conc. Prec. 338 (ed. 19).

(*s*) *Credit Co.* v. *Pott*, *sup.*; *Re Wiltshire*, [1900] 1 Q. B. 96.

ment for the benefit of creditors, or an execution creditor, of the grantor, in respect of the chattels comprised therein, which are in the apparent possession of the grantor at the time of the bankruptcy, assignment, or execution (*t*). As between the parties it will remain valid (*u*).

Act of 1882.

The effect of non-compliance with the above provisions is very different in the case of a bill of sale within the Act of 1882, that is, one given "by way of security for the payment of money" (*x*), for then the bill of sale is absolutely void, even as between the parties, "in respect of the personal chattels comprised therein" (*y*).

Further requirements under Act of 1882.

The Act of 1882 contains further requirements which must be complied with in the case of such bills of sale. This Act is to be construed as one with the Act of 1878 (*z*), and the provisions of the Act of 1878 which are inconsistent with the Act of 1882 are repealed (*a*).

Consideration less than £30.

Any such bill of sale given or made in consideration of any sum under £30 is void (*b*).

Schedule.

Specific description.

Every such bill of sale must contain, or have annexed, an inventory of the personal chattels comprised therein, in which the chattels must be "specifically described," and is void, *except as against the grantor*, in respect of the chattels not so described (*c*). The description must not be a mere general description, such as "household furniture and effects," but must be such a description as would be given in an ordinary business inventory and will be sufficient to identify the particular chattels and to distinguish them from other things of the same class (*d*).

Grantor must be "true owner."

If the grantor is not, at the time of the execution of

(*t*) 1878 Act, s. 8. See *Barron* v. *Potter*, [1915] 3 K. B. 593.

(*u*) *Davis* v. *Goodman* (1880), 5 C. P. D. 128.

(*x*) Not merely "money lent." See *North Central Wagon Co.* v. *M. S. & L. R. Co.* (1887), 35 Ch. D. 191, 215.

(*y*) 1882 Act, s. 8. See *Thomas* v. *Kelly* (1888). 13 App. Cas. 506.

(*z*) *Ib.* s. 3.

(*a*) *Ib.* s. 15.

(*b*) *Ib.* s. 12. See *Davis* v. *Usher* (1884), 12 Q. B. D. 490; *Darlow* v. *Bland*, [1897] 1 Q. B. 125.

(*c*) *Ib.* s. 4.

(*d*) *Roberts* v. *Roberts* (1884), 13 Q. B. D. 794; *Davies* v. *Jenkins*, [1900] 1 Q. B. 133.

the bill of sale, the true owner of any of the personal chattels specifically described in the schedule, the bill is void in respect of such chattels, *except as against the grantor* (*e*). A person who is holding chattels under a hire-purchase agreement giving an option to purchase but imposing no obligation to do so is not the "true owner" thereof (*f*). Also if a man has assigned his chattels by an absolute bill of sale, he is not the "true owner" of those chattels (*g*); but he is the "true owner" if he has only assigned them by way of security (*h*). A person who is the *legal* owner of the chattels at the time of the execution of the bill of sale is a "true owner" (*i*).

Exception as to crops, fixtures, plant, etc.

The foregoing provisions as to schedule, description, and true ownership, do not render a bill of sale void as to (1) growing crops separately assigned, or (2) fixtures (separately assigned), plant, or trade machinery afterwards substituted for the like articles which were specifically described in the schedule (*k*).

After-acquired chattels.

After-acquired chattels, except as aforesaid, which are not in existence at the time when the bill of sale is executed, are not "personal chattels" within the Act, and, therefore, an instrument which assigns future property is not affected by the Act so far as it deals with such property, though the inclusion of such property in the body of a bill of sale will render it void, so far as it is a bill of sale within the Act (*l*).

The form.

Every bill of sale given to secure the payment of money by the grantor is altogether void as a bill of sale under the Act of 1882 unless made in accordance with

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(*e*) 1882 Act, s. 5.

(*f*) *Lewis* v. *Thomas*, [1919] 1 K. B. 319.

(*g*) *Tuck* v. *Southern, &c. Bank* (1889), 42 Ch. D. 471.

(*h*) *Thomas* v. *Searles*, [1891] 2 Q. B. 408.

(*i*) *Re Sarl*, [1892] 2 Q. B. 591; *Harrods, Lim.* v. *Stanton*, [1923] 1 K. B. 516.

(*k*) 1882 Act, s. 6. See *London, &c. Co.* v. *Creasey*, [1897] 1 Q. B. 768.

(*l*) *Thomas* v *Kelly* (1888), 13 App. Cas. 506. See *post*, p. 131. As to assignments of future property, see *post*, p. 159.

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the form in the schedule to the Act (*m*). The bill of sale must be " in accordance with " the form (*n*), that is, it must be substantially like the form, and must not depart from it in any material respect either by adding to or subtracting from it anything which would vary its legal effect (*o*).

It is inexpedient in such a work as the present to consider in detail the numerous decisions upon s. 9 of the Act of 1882, but a brief summary of the more important points may be useful.

A bill of sale will be void under s. 9 if the name, address, and description of the grantor, grantee, and attesting witness are not stated in the body of the bill and the attestation clause respectively (*p*), or if a consideration is not stated (*q*). An incorrect statement in any of these particulars does not make the bill void under s. 9 (*r*), but it does render it invalid under s. 8 as a security, " in respect of the personal chattels comprised therein " (*r*). It will be void if property, which is not " personal chattels " (*s*) within the meaning of the Act, is comprised in the bill, *e.g.*, chattels real or future property (*t*); if two persons jointly assign chattels of which they are not joint but several owners (*u*); if any provisions are inserted which give a right to seize

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(*m*) 1882 Act, s. 9. See *infra*, p. 132-3.

(*n*) See Form in Appendix.

(*o*) *Davis* v. *Burton* (1883), 11 Q. B. D. 540; *Ex p. Stanford* (1886), 17 Q. B. D. 259; *Thomas* v. *Kelly*, *sup.*; *Davies* v. *Jenkins*, *sup.*; *Saunders* v. *White*, [1902] 1 K. B. 472.

(*p*) *Parsons* v. *Brand* (1890), 25 Q. B. D. 110; *Simmons* v. *Woodward*, [1892] A. C. 100; *Dolcini* v. *Dolcini*, [1895] 1 Q. B. 898; *Altree* v. *Altree*, [1898] 2 Q. B. 267.

(*q*) *Heseltine* v. *Simmons*, [1892] 2 Q. B 547; *Simmons* v. *Woodward*, *sup.*

(*r*) *Heseltine* v. *Simmons*, *sup.*; *Re Boddington* (1915), 84 L. J. K. B. 2119; cp. *Barron* v. *Potter*, [1915] 3 K. B. 593. See *ante*, p. 129.

(*s*) *Ante*, pp. 121-2, 130.

(*t*) *Thomas* v. *Kelly*, *sup.*; *Cochrane* v. *Entwistle* (1890), 25 Q. B. D. 116; *Swanley Co.* v. *Denton*, [1906] 2 K. B. 873; but see *Seed* v. *Bradley*, [1894] 1 Q. B. 319, and *Coates* v. *Moore*, [1903] 2 K. B. 140, as to chattels substituted for those specifically described.

(*u*) *Saunders* v. *White*, [1902] 1 K. B. 472.

the goods for any cause not specified in s. 7 (*x*); or if the principal sum secured, the rate of interest, or the time of payment, is not definitely stated (*y*).

Must contain the whole contract.

It should be added that the bill of sale must contain and show on its face all the terms of the contract, and must not incorporate any terms by reference to another document (*z*). The provisions of the Act of 1878 as to the registration of a copy of any " defeasance, condition, or declaration of trust," have been already considered (*a*).

Extent of avoidance under the various sections.

It will be observed that, in the various sections of the Acts of 1878 and 1882, the extent to which a bill of sale is made void for non-compliance with the statutory provisions differs very considerably. If a bill of sale, within the Act of 1878, is not duly attested and registered, or the consideration is not truly stated, it is void as against certain persons only, and in respect only of the chattels comprised therein which are in the possession or apparent possession of the grantor (*b*); but a bill of sale within the Act of 1882 is, in like case, " void in respect of the personal chattels comprised therein," *i.e.*, as against all persons and without reference to the possession (*c*). For non-compliance with the provisions of s. 4 of the Act of 1882, as to the inventory and specific description, a bill of sale is void, " except as against the grantor," in respect of any personal chattels not specifically described in the schedule (*d*); and, under s. 5, a bill of sale is void, " except as against the grantor," in respect of chattels so specifically described of which the grantor was not the true owner (*e*). If a bill of sale is not " in accordance with the form " as

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(*x*) *Furber* v. *Cobb* (1887), 18 Q. B. D. 494; *Cartwright* v. *Regan*, [1895] 1 Q. B. 900; *Re Bullock*, [1899] 2 Q. B. 517. For sect. 7, see *post*, pp. 133-4.

(*y*) *Hetherington* v. *Groome* (1884), 13 Q. B. D. 789; *Goldstrom* v. *Tallerman* (1886), 18 Q. B. D. 1; *De Braam* v. *Ford*, [1900] 1 Ch. 142; *Rosefield* v. *Provincial Union Bank*, [1910] 2 K. B. 781.

(*z*) *Lee* v. *Barnes* (1886), 17 Q. B. D. 77; *Sharp* v. *M'Henry* (1887), 38 Ch. D. 427, 453.

(*a*) *Ante*, p. 128.

(*b*) 1878 Act, s. 8. *Ante*, p. 129.

(*c*) 1882 Act, s. 8. *Ante*, p. 129.

(*d*) *Ib.* s. 4. *Ante*, p. 129.

(*e*) *Ib.* s. 5. *Ante*, p. 130.

prescribed by s. 9 of the Act of 1882 (*f*), or is made in consideration of a sum under £30 (*g*), it is "void." The effect of s. 9 or s. 12 is not, however, to make the whole instrument void for all purposes, but only to make it void so far as it is a bill of sale within the meaning of the Act; it will be absolutely void as to all the covenants which form part of it as a bill of sale, and as an assignment of "personal chattels" (*h*), but it will be valid as an assignment of any property which is not "personal chattels" (*i*). Under s. 9 or s. 12 the covenant to pay is void (*k*), but under s. 8 it remains valid and enforceable (*l*).

Seizure of goods and sale.

There is usually contained in a bill of sale an express power to seize on default, but apart from this the grantee has an implied power to seize for any of the causes specified in the Act of 1882 (*m*). The grantee may not seize or take possession except for one of the following causes (*n*):—

> "(1.) If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale and necessary (*o*) for maintaining the security (*p*);
>
> "(2.) If the grantor shall become a bankrupt, or suffer the said goods, or any of them, to be distrained for rent, rates, or taxes;
>
> "(3.) If the grantor shall fraudulently (*p*) either remove or suffer the said goods, or any of them, to be removed from the premises;
>
> "(4.) If the grantor shall not without reasonable excuse (*q*), upon demand in writing (*r*) by the grantee,

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(*f*) 1882 Act, s. 9. (*g*) *Ib.* s. 12.

(*h*) *Davies* v. *Rees* (1886), 17 Q. B. D. 408; *Smith* v. *Whiteman*, [1909] 2 K. B. 437.

(*i*) *Re Burdett* (1888), 20 Q. B. D. 310; *Thomas* v. *Kelly*, *sup.*; *Re Isaacson*, [1895] 1 Q. B. 333. *Ante*, pp. 121-2, 130.

(*k*) *Davies* v. *Rees*, *sup.* (*l*) *Heseltine* v. *Simmons*, *sup.*

(*m*) *Re Morritt* (1887), 18 Q. B. D. 222, 241; *Watkins* v. *Evans* (1887), *id.* 386.

(*n*) Act of 1882, s. 7.

(*o*) *Bianchi* v. *Offord* (1886), 17 Q. B. D. 484, 487.

(*p*) See *Furber* v. *Cobb* (1887), 18 Q. B. D. 494, 503, 505, 509.

(*q*) See *Ex p. Cotton* (1883), 11 Q. B. D. 301; *Ex p. Wickens*, [1898] 1 Q. B. 543.

(*r*) *Davis* v. *Burton* (1883), 11 Q. B. D. 537, 542; *Ex p. Wickens*, *sup.*

produce to him his last receipts for rent, rates, and taxes;

"(5.) If execution shall have been levied against the goods of the grantor under any judgment at law."

And it is provided that the grantor may within five days from such seizure or taking possession apply to the High Court; and the Court, or a judge thereof, if satisfied that by payment of money or otherwise the cause of seizure no longer exists, may restrain the grantee from removing or selling, or may make such other order as may seem just (*s*); and, doubtless in furtherance of this provision, the goods may not be removed or sold until after five clear days from the day they were seized or taken possession of (*t*). After the expiration of the five days, this summary remedy given to the grantor is lost, but the equitable right to redeem remains (*u*).

Power of sale.

Under the Act of 1882 there is an implied power to sell the goods at the expiration of five days after seizure (*x*), but the power of sale given by sect. 101 of the Law of Property Act, 1925 (*y*), is not incorporated (*x*). As incidental to the power of sale, there are implied trusts by virtue of which the mortgagee may out of the proceeds of sale retain the principal and interest owing, and also the costs and expenses incurred by him in discharging any distress or execution or other incumbrance affecting the goods, and in taking and keeping possession of them, and in removing, warehousing, valuing and selling them (*z*); but an express power to retain other sums not coming within the above category will make the bill of sale void (*a*).

Debentures.

The mortgages, charges, and debentures of any incorporated company, for the registration of which

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(*s*) 1882 Act, s. 7; *Ex p. Cotton, sup.; Ex p. Wickens, sup.; Ex p. Ellis*, [1898] 2 Q. B. 79.

(*t*) *Ib.* s. 13. See *O'Neill* v. *City, &c. Co.* (1886), 17 Q. B. D. 234.

(*u*) *Johnson* v. *Diprose*, [1893] 1 Q. B. 512.

(*x*) *Re Morritt* (1887), 18 Q. B. D. 222; *Calvert* v. *Thomas* (1887), 19 *id.* 204.

(*y*) Re-enacting s. 19 of the Conveyancing Act, 1881.

(*z*) *Ex p. Rawlings* (1887), 18 Q. B. D. 489; *Lumley* v. *Simmons* (1887), 34 Ch. D. 698.

(*a*) *Calvert* v. *Thomas, sup.*; *Furber* v. *Cobb* (1887), 18 Q. B. D. 494.

statutory provision is made, are not within the Bills of Sale Acts (*b*), and this includes a deed of charge to cover debentures (*c*). But an absolute bill of sale given by a corporation is within the Act of 1878 (*d*). The debentures of a society registered under the Industrial and Provident Societies Act are, however, within the Acts, and are not exempted by section 17 of the Act of 1882, which exempts debentures issued by an "incorporated company" (*e*).

Priority.

In case two or more bills of sale are given comprising in whole or in part any of the same chattels, they will have priority in the order of the date of their registration (*f*); and, as regards bills of sale under the Act of 1878, a bill of sale attested and registered will take priority over one that is earlier but unregistered (*g*).

Assignment.

A transfer or assignment of a registered bill of sale, as already stated (*h*), need not be registered; and there is no distinction in this respect between a bill of sale by way of security, upon which an equity of redemption is reserved, and an absolute bill of sale, or between an equitable transfer and a legal one (*i*).

Entry of satisfaction.

Where the debt for which a bill of sale was made or given has been satisfied or discharged, the registrar may order a memorandum of satisfaction to be written upon any registered copy of it, on the consent of the person entitled to the benefit of the bill of sale, or on proof that the debt has been satisfied or discharged (*k*).

(*b*) *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627.

(*c*) *Richards* v. *Kidderminster*, [1896] 2 Ch. 212. *Post*, Chap. XV.

(*d*) *Re Cunningham & Co., Lim., Attenborough's Case* (1885), 28 Ch. D. 682.

(*e*) *G. N. R. Co.* v. *Coal, &c. Society*, [1896] 1 Ch. 187; *Re North Wales Produce, &c. Co.*, [1922] 2 Ch. 340.

(*f*) 1878 Act, s. 10; 1882 Act, s. 3.

(*g*) *Conelly* v. *Steer* (1881), 7 Q. B. D. 521.

(*h*) *Ante*, pp. 127-8.

(*i*) *Ex p. Turquand* (1885), 14 Q. B. D. 636, 644.

(*k*) Act of 1878, ss. 15, 21; R. S. C., Ord. LXI., rr. 26, 27. See *Re White and Rubery*, [1894] 2 Q. B. 923.

CHAPTER VII.

SHIPS.

Chap. VII.

Ships. Merchant Shipping Acts, 1894-1925.

PROPERTY in ships is subject to special laws, partly founded on the civil law as formerly administered by the Court of Admiralty, and partly contained in the Merchant Shipping Acts, 1894 to 1925, by which the prior Acts have been repealed (*a*).

Owners.

The Act of 1894 provides that a ship shall not be deemed to be a British ship unless owned by (1) natural-born British subjects, (2) naturalized persons, (3) denizens, or (4) corporations established under the laws of some part of, and having their principal place of business in, the British dominions (*b*). A natural-born subject who has become a citizen or subject of a foreign State, a naturalised person, or a denizen, cannot be owner of a British ship until he has taken the oath of allegiance to the Sovereign, and resides in, or is partner in a firm carrying on business in, the British dominions (*b*).

Aliens.

The British Nationality and Status of Aliens Act, 1914, re-enacting sect. 14 of the Naturalization Act, 1870, which enables an alien to take, acquire, hold, and dispose of real and personal property of every description, makes a special exception in the case of a British ship or any share therein, and continues the incapacity of an alien to hold this kind of property (*c*).

If an alien or other unqualified person acquires any interest in a British ship, except by transmission on

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(*a*) Act of 1894, s. 745.

(*b*) *Ib.* s. 1. The effect of sect. 3 of the British Nationality Act, 1914, is, apparently, to dispense with the necessity of residence in or membership of a firm carrying on business in the British dominions, in the case of a naturalized person. See Temperley, M. S. Acts ed. 3, p. 3. See *post*, Chap. XX.

(*c*) 4 & 5 Geo. 5, c. 19, s. 17.

marriage, death, bankruptcy, or other lawful means, that interest is subject to forfeiture (*d*). In the case of transmission by marriage, &c., an application must be made to the Court for sale of such interest within four weeks after such transmission has taken place (*e*).

"Ship."

The Merchant Shipping Act, 1894, defines "ship" as including "every description of vessel used in navigation not propelled by oars," and "vessel" as including "any ship or boat, or any other description of vessel used in navigation" (*f*).

Registration.

Every British ship must be registered (*g*), with the exception of some small vessels not exceeding 15 or 30 tons burden respectively, specially employed as in the Act mentioned (*h*).

No ship required to be registered will, unless registered, be recognized as a British ship (*g*), and may be detained until the master of such ship, upon being required, produces the certificate of registry (*g*).

If, when required, satisfactory evidence is not given that a ship registered as a British ship is entitled to be so registered, the ship will be subject to forfeiture (*i*).

Shares.

With respect to entries in the register book, the property in a ship is to be divided into sixty-four shares; not more than sixty-four individuals are to be registered at the same time as owners of any one ship; but this rule does not affect the beneficial title of any number of persons or of any company represented by, or claiming under or through, any registered owner or joint owner; no person is to be registered as owner of any fractional part of a share; but any number of persons not

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(*d*) Act of 1894, ss. 28, 71, 76.

(*e*) *Ib.* s. 28.

(*f*) *Ib.* s. 742. See *Ex p. Ferguson* (1871), L. R. 6 Q. B. 280; *Southport (Mayor of)* v. *Morriss*, [1893] 1 Q. B. 359; *The Harlow*, [1922] P. 175. This definition has been extended to include, for certain purposes, all lighters and barges, however propelled, unless used exclusively in non-tidal harbours. See M. S. Act, 1921 (11 & 12 Geo. 5, c. 28), s. 1.

(*g*) Act of 1894, s. 2. As to "British ship," see *Union Bank* v. *Lenanton* (1878), 3 C. P. D. 243.

(*h*) *Ib.* s. 3.

(*i*) 6 Edw. 7, c. 48, s. 51.

exceeding five may be registered as joint owners of a ship, or of a share or shares therein, and joint owners are to be considered as constituting one person only, and are not to be entitled to dispose in severalty of any interest; a body corporate may be registered as owner by its corporate name (*k*). No person is to be registered as owner of a ship, or any share therein, until he has made and subscribed the declaration of ownership prescribed by the Act (*l*); and no body corporate is to be so registered until the secretary, or other officer authorized by them for the purpose, has made the prescribed declaration (*m*).

The mere fact that several persons hold shares in the same ship does not make them partners; whether they are part-owners only, or partners, depends upon circumstances; the former is the general relation, the latter the exception (*n*). In the absence of special circumstances, the holders of the shares have *inter se* the rights of tenants in common, but the law as to the earnings of a ship, whether as freight or otherwise, follows the general law of partnership (*o*).

On the subject of disputes between co-owners as to the employment of the ship, Abbott, C.J., said (*p*):—

Disputes between owners.

> "It has been the constant practice, in disputes between part-owners as to the employment of the vessel, where the majority in value of the shareholders are desirous to send the vessel on a voyage to which the minority will not consent, for the Court of Admiralty to arrest the ship at the instance of the latter, and to take from the majority a stipulation in a sum equal to the value of the shares of those who disapprove of the adventure, either to bring back and restore to them the ship, or to pay them the value of their shares. Although the jurisdiction of the Admiralty in such cases was once doubted, there are several authorities recognizing it; and it may now be taken to be settled that, in disputes between part-owners as to the employment of a ship, the Court of Admiralty may

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(*k*) Act of 1894, s. 5.

(*l*) *Ib.* s. 9.

(*m*) *Ib.* ss. 9, 61.

(*n*) *Helme* v. *Smith* (1831), 7 Bing. 709; Story on Partnership, chap. 16, s. 417.

(*o*) *Green* v. *Briggs* (1848), 6 Hare, 395.

(*p*) *Re Blanchard* (1823), 2 B. & C. 248; 26 R. R. 329.

arrest and detain the ship, until security be given to the amount of the value of the shares of those part-owners who dissent from the particular employment."

The Court of Admiralty was unable to determine questions of title to the shares in a ship, or to take the accounts between the part-owners; but by the Admiralty Court Act, 1861 (*q*), it acquired jurisdiction to decide all questions arising between co-owners or any of them touching the ownership, possession, employment, and earnings of any ship registered at any port of England or Wales, and to settle all accounts outstanding and unsettled between them, and to direct the ship or any share to be sold, or to make such order as to it should seem fit (*r*).

Trusts.

No notice of any trust, express, implied, or constructive, is to be registered or received by the registrar; and, subject to any rights and powers appearing by the register to be vested in any other party, the registered owner of any ship or share therein has power absolutely to dispose of such ship or share, and to give effectual receipts for the consideration money (*s*).

Equitable interests.

Subject to the above provisions, and to the provisions for the exclusion of unqualified persons, equitable interests may be enforced by or against owners and mortgagees in the same manner as in respect of any other personal property (*t*). A person beneficially interested, otherwise than by way of mortgage, in a ship or share registered in the name of another, is subject to all pecuniary penalties imposed by statute upon owners (*x*).

Transfer of property in ship.

A registered ship or share therein must be transferred by bill of sale according to the prescribed form, executed by the transferor in the presence of and attested by one or more witnesses (*y*).

(*q*) 24 Vict. c. 10, s. 8. See now Supreme Court of Judicature (Consolidation) Act, 1925, s. 22.

(*r*) See Maude & Pollock on Merchant Shipping, 102.

(*s*) Act of 1894, s. 56; *Bathyany* v. *Bouch* (1881), 50 L. J. Q. B. 421; *The Horlock* (1877), 2 P. D. 243.

(*t*) Act of 1894, s. 57. See s. 5, *sup.*; *Ward* v. *Beck* (1863), 13 C. B. (N.S.) 668; *Black* v. *Williams*, [1895] 1 Ch. 408.

(*x*) Act of 1894, s. 58.

(*y*) *Ib.* s. 24.

It will be remembered that transfers or assignments of a ship or vessel or any share thereof are not included in the Bills of Sale Act, 1878 (*z*). Ships do not pass by delivery; there is no market overt for ships (*a*).

The transferee must make and subscribe the prescribed declaration of transfer (*b*), and the bill of sale when duly executed must be produced to the registrar of the port at which the ship is registered, and the registrar will enter in the register book the name of the transferee, and indorse the bill of sale with the date of entry; all bills of sale are to be entered in the order of their production to the registrar (*c*).

Where a transfer of an interest in a ship is declared void by reason of fraud or otherwise, the Court has power to order the register to be rectified by expunging the entry (*d*).

Transmission of property in ship on death, etc.

When the property in a registered ship, or share therein, is transmitted (*e*) to a qualified person on the marriage, death, or bankruptcy of a registered owner, or by any lawful means other than a transfer under the Act, such transmission must be authenticated by a declaration of the person to whom such property has been transmitted, in the prescribed form, accompanied by the prescribed evidence; and the registrar is to register the name of the person or persons entitled, and such persons, if more than one, however numerous, are to be considered as one person only as regards the rule relating to the number of persons entitled to be registered as owners (*f*).

Transmission to unqualified persons.

If the property in a registered ship, or share therein, is transmitted on marriage, death, bankruptcy, or otherwise, to an unqualified (*g*) person, the proper Court may, on application by such person, order a sale and payment

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(*z*) 41 & 42 Vict. c. 31, s. 4.

(*a*) *Hooper* v. *Gumm* (1867), 2 Ch. 282.

(*b*) Act of 1894, s. 25.

(*c*) *Ib.* s. 26.

(*d*) *Brond* v. *Broomhall*, [1906] 1 K. B. 571.

(*e*) As to the meaning of "transmitted," see *Chasteauneuf* v. *Capeyron* (1882), 7 App. Cas. 127.

(*f*) Act of 1894, ss. 27, 38.

(*g*) See *ante*, p. 136.

of the proceeds to such person (*h*). This application must be made within four weeks of the transmission; but the Court may extend the time, but not so as to exceed one year (*h*). If the application is not made in time, or a sale is refused by the Court, the share is subject to forfeiture under the Act (*h*).

Mortgages.

A mortgage of a registered ship, or share therein, must be in the prescribed form, and, on production of it, the registrar is to record it in the register book; and every such mortgage is to be recorded in the order of time in which it is produced to him for that purpose (*i*). If there is more than one mortgage registered, the mortgagees are, notwithstanding any express, implied or constructive notice, entitled to priority according to the date of registration (*k*). Provision is made for entry of the discharge of a mortgage (*l*), for transfer of mortgages (*m*), for sale by mortgagees (*n*), and for the transmission of the interest of a mortgagee on marriage, death or bankruptcy, or by any lawful means other than by a transfer (*o*). A registered mortgage is not affected by any act of bankruptcy by the mortgagor after the date of the record of the mortgage (*p*).

Except so far as may be necessary for making the ship or share available as a security for the debt, a mortgagee is not, by reason of the mortgage, to be deemed the owner, or the mortgagor to have ceased to be the owner (*q*). The mortgagor remains the *dominus* of the ship with regard to everything connected with its employment, until the mortgagee takes possession; and

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(*h*) Act of 1894, s. 28; see s. 76.

(*i*) Act of 1894, s. 31. As to the effect of omitting to register the mortgage, see *Keith* v. *Burrows* (1876-7), 1 C. P. D. 722; 2 App. Cas. 636. As to the rights conferred by a foreign mortgage on a foreign ship, see *The Colorado*, [1923] P. 102.

(*k*) *Ib.* s. 33. See *Black* v. *Williams*, [1895] 1 Ch. 408.

(*l*) *Ib.* s. 32.

(*m*) *Ib.* s. 37.

(*n*) *Ib.* s. 35.

(*o*) *Ib.* s. 38; see s. 27.

(*p*) *Ib.* s. 36. See *Hay* v. *Fairburn* (1818), 2 B. & Ald. 193.

(*q*) *Ib.* s. 34. See *Collins* v. *Lamport* (1864), 4 De G. J. & S. 500.

the mortgagee when he takes possession is entitled to the benefit of contracts made by the mortgagor (*r*); but the mortgagee is not bound by a contract made by the mortgagor which is such as to impair his security, *e.g.*, a charter-party which involves risk of capture by a belligerent (*s*).

As stated above, subject to the provisions of the Acts, equitable interests may be enforced by or against owners and mortgagees of ships in respect of their interest therein in the same manner as in respect of any other personal property. Consequently there may be an unregistered mortgage which is perfectly good as between the shipowner and the mortgagee but liable to be defeated by a subsequent registered mortgage.

Certificate of mortgage or of sale.

Any registered owner, desirous of disposing by way of mortgage or sale of the ship or share, in respect of which he is registered, at any place out of the country or possession in which the port of registry of such ship is situate, may obtain from the registrar a certificate of mortgage or certificate of sale, as prescribed, enabling him to mortgage or sell the ship or his share therein (*t*).

Charter-party (*u*).

The agreement by which "a shipowner agrees to place an entire ship, or a part of it, at the disposal of a merchant for the conveyance of goods, binding the shipowner to transport them to a particular place for a sum of money which the merchant undertakes to pay as freight for their carriage," is termed the "charter-party" (*x*). The term is said to be a corruption of the Latin words *carta partita*; the two parts being usually written in former times on one piece of parchment,

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(*r*) *Keith* v. *Burrows* (1877), 2 App. Cas. 636.

(*s*) *Law Guarantee Soc.* v. *Russian Bank*, [1905] 1 K. B. 815.

(*t*) Act of 1894, ss. 39-46; s. 44 is amended by s. 52 of the Act of 1906 (6 Edw. 7, c. 48).

(*u*) See Form in Appendix.

(*x*) Maude & Pollock, 289. This definition is of a "voyage" charter-party. It would require to be modified for a "time" charter, *i.e.*, where the ship itself is let out for a definite period either with or without the services of the master and crew. See Scrutton, Charterparties, &c., Articles 1 and 2; also *Scottish Navigation Co.* v. *Souter & Co.*, [1917] 1 K. B. 222.

which was afterwards divided by a straight line cut through some word or figure, so that one part should fit and tally with the other (*y*). "Charter-parties are not now usually made by deed: they embody the terms upon which the shipowner lends the use of the ship, and contain stipulations as to the rate of remuneration, the nature of the voyage, and the time and mode of employing the vessel" (*z*).

Freight.

Freight, in the strict meaning of the word, is the recompense to be earned by the owner of the ship if he carries the goods on the voyage and delivers them at the port of destination; but in charter-parties the word "freight" is sometimes used in a secondary meaning (*a*), as being money paid in advance by a charterer or shipper of goods on the goods being taken on board, irrespective of their being safely delivered at the end of the voyage, and sometimes as including "dead freight" (*b*), *i.e.*, freight which would have been payable for that part of the ship which has not but ought to have been occupied by cargo according to the charter-party.

The right to the freight is incidental to the ownership of the ship, and therefore the assignment of a ship or share in the ship passes a corresponding right to freight under an existing charter-party. But the assignment of freight to be earned is valid in equity, and if notice of the assignment is given to the charterer (*c*), the assignee is entitled to the freight as against a person who subsequently takes an assignment of the ship or share (*d*).

A mortgagee does not usually by the mortgage alone acquire a right to the freight, but if he takes possession

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(*y*) Abbott's Law of Shipping, 330.

(*z*) Maude & Pollock, 290.

(*a*) *Hall* v. *Janson* (1855), 4 E. & B. 509; *Thompson* v. *Gillespie* (1855), 5 *Id.* 215; *Allison* v. *Bristol Marine Co.* (1876), 1 App. Cas. 224, 225, 239; *Smith* v. *Pyman*, [1891] 1 Q. B. 742; *Oriental Co.* v. *Tylor*, [1893] 2 Q. B. 518.

(*b*) *Birley* v. *Gladstone* (1814), 3 M. & S. 205; 15 R. R. 465; *Phillips* v. *Rodie* (1812), 15 East, 547; 13 R. R. 528; *Pearson* v. *Göschen* (1864), 17 C. B. (N.S.) 352. See also *Gray* v. *Carr* (1871), L. R. 6 Q. B. 522.

(*c*) See *post*, Chap. VIII., "Choses in Action."

(*d*) *Lindsay* v. *Gibbs* (1856), 22 Beav. 522.

he is then entitled to receive the freight which becomes due after, but not freight which became due before, he has taken possession (*e*).

Lien for freight.

The shipowner has a possessory lien on the goods carried for the freight (in the strict meaning of the term (*f*)) due in respect of them, and also a lien on the whole of the cargo for any sum which has to be paid for the hire of the ship, even if it is not to be calculated with respect to the quantity of the goods (*g*). And by express contract contained in the charter-party the shipowner may have a lien for charges other than freight, such, for example, as dead freight (*h*).

As the shipowner's lien is possessory, he loses it if he delivers the goods; and therefore, in the absence of special contract, he can refuse to deliver them until the freight is paid (*i*).

The Merchant Shipping Act, 1894, however, provides that the shipowner can preserve his lien for freight and other charges, on landing goods and placing them in a wharf or warehouse, by giving notice in writing to the wharfinger or warehouseman (*k*). If the lien is not discharged, or the prescribed deposit made (*l*), the wharfinger or warehouseman may, after ninety days, or a shorter time if the goods are perishable, sell the goods by public auction and pay the duties, expenses, and amount of the lien (*m*).

The charter-party may operate as a demise of the ship itself (*n*), in which case the shipowner never obtains possession of the goods, and therefore has no lien for his freight, except by express agreement (*o*); but, if the con-

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(*e*) *Keith* v. *Burrows* (1877), 2 App. Cas. 636; *Shillito* v. *Biggart*, [1903] 1 K. B. 683. As to the position of the mortgagee in possession, see *The Lord Strathcona*, [1925] P. 143.

(*f*) *Kirchner* v. *Venus* (1859), 12 Moo. P. C. 361.

(*g*) *Neish* v. *Graham* (1857). 8 E. & B. 505.

(*h*) *McLean* v. *Fleming* (1871), L. R. 2 H. L. Sc. 128.

(*i*) *Campion* v. *Colvin* (1836), 3 B. N. C. 17.

(*k*) 57 & 58 Vict. c. 60, s. 494.

(*l*) *Ib.* ss. 495, 496. See *White* v. *Furness*, [1895] A. C. 40.

(*m*) *Ib.* ss. 497-500. *Ante*, p. 43.

(*n*) *Belcher* v. *Capper* (1842), 4 M. & Gr. 502; 61 R. R. 566.

(*o*) *Baumwoll-Scheibler* v. *Furness*, [1893] A. C. 8.

struction of the charter-party is ambiguous, there is a tendency not to construe it as a demise (*p*); and holders of bills of lading, in the absence of notice of the terms of the charter-party, are entitled to assume that the ship-master is the agent of the owners (*q*).

Bill of lading.

Where a ship is not chartered wholly to one person, but the owners offer her generally to carry the goods of any merchants who may choose to employ her, or where one merchant to whom she is chartered offers her to several sub-freighters for the conveyance of their goods, she is called a "general ship." In these cases the contract entered into by and with the owners, or the master on their behalf, is evidenced by a bill of lading. It generally happens even where the ship is chartered wholly to one person by whom the whole cargo is shipped that there is a bill of lading (*r*). But such a bill of lading generally operates merely as a receipt for the goods and is not a contractual document unless and until it is negotiated to a third party (*r*).

"General ship."

The Carriage of Goods by Sea Act, 1924 (*s*), now imposes on the carrier certain minimum responsibilities, out of which he cannot contract, in respect of the carriage of goods under bills of lading on voyages (other than coasting voyages) from ports in Great Britain or Northern Ireland, and at the same time gives him the benefit of certain statutory exceptions.

Proceedings *in rem.*

Certain pecuniary claims can be enforced by Courts having Admiralty jurisdiction against the ship cargo and freight, or against the ship only, or the cargo only (*t*). Proceedings to enforce such claims in this manner are called "proceedings *in rem*," and are commenced by process served on the *res* (*u*), which is generally followed

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(*p*) *Christie* v. *Lewis* (1821), 2 B. & B. 410; 23 R. R. 483; *Saville* v. *Campion* (1819), 2 B. & Ald. 503; 21 R. R. 376.

(*q*) *Manchester Trust* v. *Furness*, [1895] 2 Q. B. 539.

(*r*) See *Repetto* v. *Millar's etc. Forests, Ltd.*, [1901] 2 K. B. 306. See Form in Appendix.

(*s*) 14 & 15 Geo. 5, c. 22.

(*t*) Supreme Court of Judicature (Consolidation) Act, 1925, s. 22.

(*u*) As to the jurisdiction of the Court of Admiralty, see *The Queen* v. *Judge of City of London Court*, [1892] 1 Q. B. 273.

by the arrest of the *res* (*x*). These proceedings depend to a certain extent on maritime lien, which is the right of certain classes of persons to have their demands against the owner of the *res* satisfied out of the *res* in priority to other claimants.

Maritime lien.

A maritime lien relates back to the time when it arose, and binds the *res* into whosesoever hands it may have passed (*y*); and, if it is enforced with diligence, even against a *bona fide* purchaser without notice (*z*).

There are some cases in which a creditor who has not a maritime lien can take proceedings *in rem*, but his position differs from that of the creditor who has a maritime lien. He cannot have an action *in rem*, unless, at the time of its institution, the *res* is the property of his debtor; while the creditor who has the lien, provided he uses due diligence, can bring the action notwithstanding that his debtor has ceased to be the owner of the *res* (*a*).

The principal matters which give rise to maritime lien are collision, salvage, hypothecation, and the wages of the seamen and master.

Collision.

In case of collision, a maritime lien attaches on the vessel in fault and her freight (*b*), to the extent of the damage done, but the liability of the shipowner for loss occasioned without his actual fault or privity is limited to an aggregate amount not exceeding £15 a ton, calculated on the ship's tonnage, when accompanied by loss of life or personal injury, and in other cases to an

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(*x*) R. S. C. Ord. V., rr. 16, 17. Where the ship belongs to a company which is being wound up, proceedings should be taken in the winding-up instead of *in rem* (*Re Australian Navigation Co.* (1875), 20 Eq. 325), unless mortgagees who are not bound by the proceedings in the winding up are in possession: *Re Rio Grande Steamship Co.* (1877), 5 Ch. D. 282. A public ship belonging to a State is not liable to seizure even if it carries passengers and merchandise for hire: *The Parlement Belge* (1880), 5 P. D. 197.

(*y*) *The Two Ellens* (1871), L. R. 4 P. C. 161; *The Bold Buccleugh* (1851), 7 Moo. P. C. 267.

(*z*) *The Charles Amelia* (1868), L. R. 2 A. & E. 330.

(*a*) *The Heinrich Bjorn* (1886), 11 App. Cas. 277.

(*b*) *The Bold Buccleugh*, *sup.*

aggregate amount not exceeding £8 a ton (*c*). The additional £7 per ton is only applicable to the satisfaction of claims on account of loss of life or personal injury.

Salvage.

At common law, a person who, by his labour, saves a thing from destruction has a possessory lien on it for payment for his services, but the lien is lost by parting with the thing (*d*). Salvage, as the term is used in Courts having Admiralty jurisdiction, is the compensation allowed to persons acting as volunteers, not under a contract or duty binding them to perform the service (*e*), by whose exertions a ship, boat, or the cargo of a ship, or the lives of persons belonging to her, are saved from danger or loss in cases of wreck, dereliction, capture, or the like (*f*). In order to support a claim for salvage, there must be skill and enterprise on the part of the salvors and danger to the property saved (*g*). The salvors may, by misconduct, forfeit their claim to salvage reward (*h*).

Where salvage services have been rendered to a ship or cargo, or in saving lives of persons on the ship, the salvors are entitled to be recompensed out of the ship and cargo and apparel (*i*), and have a maritime lien for the amount on the property (*k*). This lien ranks before all maritime liens which had previously attached on the property (*l*); and salvage for saving life, when payable

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(*c*) Act of 1894, ss. 502-509, amended by the Merchant Shipping (Liability of Shipowners) Act, 1898, and Shipowners' Negligence (Remedies) Act, 1905. See *Stoomvart Maatschappij* v. *P. & O. Co.* (1882), 7 App. Cas. 795, where Lord Blackburn reviews the legislation on this subject; and *The Stella*, [1900] P. 161. As to apportionment of liability, see Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 57).

(*d*) *Ante*, p. 44; *Hartfort* v. *Jones* (1698), 1 Ld. Raym. 393; 2 Salk. 654.

(*e*) *The Neptune* (1824), 1 Hagg. Ad. 227; *The Crusader*, [1907] P. 196.

(*f*) Act of 1894, ss. 544-565.

(*g*) *The Clifton* (1833), 3 Hagg. Ad. 120; *Castellain* v. *Thompson* (1862), 13 C. B. (N.S.) 105; *The Strathnaver* (1876), 1 App. Cas. 58.

(*h*) *The Capella*, [1892] P. 70; *The Clan Sutherland*, [1918] P. 332.

(*i*) Act of 1894, ss. 544-546.

(*k*) *Cargo ex Schiller* (1877), 2 P. D. 145.

by the shipowner, has priority over all other salvage claims (*m*).

Bottomry.

Hypothecation may be effected either by way of bottomry or *respondentia*. Bottomry (so called, because formerly the keel or bottom of the ship, as representing the entire fabric, was alone mentioned) is an hypothecation of the ship, with or without its freight and cargo, as a security for the payment, in the event only of the safe arrival of the ship at her destination (*n*), of a debt contracted for the supply of necessaries for the preservation of the ship and the continuance of the voyage. The debt is lost on the non-arrival of the ship (*o*), and the maritime risk falling on the person advancing the money is essential to the validity of the hypothecation (*p*).

Bottomry is effected by an instrument in writing called a bottomry bond, signed by the master or owner, and usually, though not necessarily, under seal (*q*). A bottomry bond can be given in cases of necessity only, *i.e.*, in cases where, without an advance of money, the ship cannot proceed (*r*). Before giving the bond the master must endeavour to obtain the money required on the personal credit of the owner (*s*), or from his agent (*t*); and he must communicate, if possible, with the shipowner if he intends to hypothecate the ship, or ship and freight only (*u*), and with the cargo owner if he intends to hypothecate the cargo only (*x*). The person advancing the money must satisfy himself that all these conditions are complied with; but, if they

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(*l*) *The Veritas*, [1901] P. 304.

(*m*) Act of 1894, s. 544 (2).

(*n*) *The Nelson* (1823), 1 Hagg. Ad. 169.

(*o*) Fisher on Mortgages, § 235; *The Atlas* (1827), 2 Hagg. Ad. 48.

(*p*) *The Indomitable* (1859), Swab. 446; *Stainbank* v. *Shepard* (1853), 13 C. B. 418; *The Haabet*, [1899] P. 295.

(*q*) *The Cecilie* (1879), 4 P. D. 210.

(*r*) *The Orelia* (1833), 3 Hagg. Ad. 84.

(*s*) *Heathorn* v. *Darling* (1836), 1 Moo. P. C. 5; *Soares* v. *Rahn* (1838), 3 *id.* 1.

(*t*) *Lyall* v. *Hicks* (1859), 27 Beav. 616.

(*u*) *Wallace* v. *Fielden* (1851), 7 Moo. P. C. 398.

(*x*) *The Gratitudine* (1801), 3 C. Rob. 240; *Kleinwort* v. *Cassa Marittima* (1877), 2 App. Cas. 156.

are, he is not bound to see to the application of the money advanced. If the cargo is included in the bond, the shipowner is bound to indemnify the owner of the cargo (*y*).

Where there are several bondholders, they have priority *inter se* in inverse order of their date (*z*).

Respondentia (*a*).

Respondentia is the separate hypothecation of merchandise laden or to be laden on board ship as a security for the repayment of a debt contracted for the necessary costs of transmitting and forwarding the merchandise to its destination, or to free it from arrest for salvage. The repayment is made contingent on the safe arrival of the merchandise, and is subject to the same rules as bottomry (*b*).

Seamen's wages.

The seamen have a maritime lien upon the ship and freight for their wages, which cannot be given up by any agreement, and is not destroyed (*c*) by hypothecation of the ship or its sale to a purchaser without notice (*d*).

Master's wages and disbursements.

Formerly the master had no maritime lien for his wages (*e*), but now he has the same rights, liens, and remedies for the recovery of his wages that seamen have (*f*). He also has the same rights, liens, and remedies, so far as the case permits, for the recovery of disbursements or liabilities properly made by him on account of the ship (*g*), that is, for which he had authority to pledge the shipowner's credit (*h*).

Priorities between maritime liens.

It will be observed that in every case, except collision, in which a maritime lien arises, the person becoming

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(*y*) *Duncan* v. *Benson* (1848), 1 Ex. 537; 3 Ex. 644.

(*z*) *The Betsey* (1813), 1 Dods. 289.

(*a*) *The Sultan* (1859), Swab. 504.

(*b*) *The Cognac* (1832), 2 Hagg. Ad. 386; *The Sultan*, *sup.* See, as to communication with the owner of the cargo, *The Onward* (1873), L. R. 4 A. & E. 39.

(*c*) *The Constancia* (1846), 10 Jur. 845; Act of 1894, s. 156.

(*d*) *The Sydney Cove* (1815), 2 Dods. 13.

(*e*) *Smith* v. *Plummer* (1818), 1 B. & Ald. 575; 19 R. R. 391.

(*f*) Act of 1894, s. 167.

(*g*) *Ib.* s. 167 (2). For the previous law, see *The Sara* (1889), 14 App. Cas. 209.

(*h*) *Morgan* v. *Castlegate Co.*, [1893] A. C. 38; *The Orienta*, [1895] P. 49.

entitled to the lien has done something which is for the common benefit of all persons interested in the *res* on which the lien attaches, including persons interested in maritime liens which have previously attached on the *res*. It follows that, as a general rule, a maritime lien posterior in date has priority over one of prior date.

Collision.

In the case of collision, the ship which is in fault must have been navigated faultily, and the maritime lien arising in favour of the ship entitled to be paid not only takes precedence of maritime liens prior in date, but also of the lien of the seamen for wages earned by them since the collision (*i*).

Possessory lien for repairs and necessaries.

A person who repairs a ship, or supplies her with necessaries (*k*), or pays for them (*l*), has a *possessory* lien on it for his remuneration or debt which is subject to existing maritime liens (*m*), and is lost on his giving up possession. There is no *maritime* lien in such cases (*n*).

General average.

A general average loss is a loss caused by or directly consequential on a general average act (*o*); it includes a general average expenditure as well as a general average sacrifice (*o*). A " general average act " is any extraordinary sacrifice (*p*) or expenditure voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property in the common adventure (*q*).

(*i*) *The Elin* (1883), 8 P. D. 129.

(*k*) *Moran* v. *Uzielli*, [1905] 2 K. B. 555. As to the meaning of "necessaries," see *Webster* v. *Seekamp* (1821), 4 B. & Ald. 354; 23 R. R. 307; *The Heinrich Bjorn* (1883), 8 P. D. 151; *The Marianne*, [1891] P. 180; *The Arzpeitia* (1921), 126 L. T. 29.

(*l*) *Foong Tai* v. *Buchheister*, [1908] A. C. 458.

(*m*) *The Gustaf* (1864), Lush. 506.

(*n*) *The Heinrich Bjorn* (1886), 11 App. Cas. 270; *Moran* v. *Uzielli*, *sup.*

(*o*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 66 (1); *Atwood* v. *Sellar* (1880), 5 Q. B. D. 286; *Whitecross Co.* v. *Savill* (1882), 8 *id.* 661. Most charterparties and bills of lading now provide that general average shall be adjusted according to a conventional code of rules known as the York-Antwerp Rules.

(*p*) *Shepherd* v. *Kottgen* (1877), 2 C. P. D. 589.

(*q*) S. 66 (2); *Atwood* v. *Sellar*, *sup.*; *Svensden* v. *Wallace* (1885), 10 App. Cas. 404; *Rose* v. *Bank of Australasia*, [1894] A. C.

The party upon whom a general average loss falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution, called a general average contribution, from the other parties interested (*r*), provided that he has not by his own fault occasioned the peril which gave rise to the claim (*s*).

Loss of this character is almost invariably covered by insurance.

The assured, who has incurred a general average expenditure, can recover from the insurer in respect of his proportion of the loss (*t*), and he can recover in respect of the whole loss in the case of a general average sacrifice, without having enforced his right of contribution (*t*), and where he has paid, or is liable to pay, a general average contribution, he can recover therefor from the insurer (*u*). The insurer, however, is not liable for any general average loss or contribution if the loss was not incurred in respect of the avoiding of a peril insured against (*x*).

If the ship, freight, and cargo, or any two of them, belong to the same assured, the liability of the insurer for general average losses or contributions is the same as if there were different owners (*y*).

The ship, nett freight (*z*) and cargo (*a*) have (but the wearing apparel, &c. of the passengers and crew, the wages of the crew, and the stores and provisions (*b*) of the ship have not) to contribute. The value of the ship must be taken at the end of the voyage (*c*); or, if she is

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687; *Iredale* v. *China Traders' Co.*, [1900] 2 Q. B. 515; *Hamel* v. *P. & O. Co.*, [1908] 2 K. B. 298.

(*r*) S. 66 (3); *Svensden* v. *Wallace*, *sup.*; *Strang* v. *Scott* (1889), 14 App. Cas. 601, 607; *The Marpessa*, [1891] P. 403.

(*s*) See *Milburn* v. *Jamaica Co.*, [1900] 2 Q. B. 540; *Greenshields* v. *Stephens*, [1907] A. C. 431.

(*t*) S. 66 (4).

(*u*) S. 66 (5).

(*x*) S. 66 (6).

(*y*) S. 66 (7). See *Montgomery* v. *Indemnity Co.*, [1902] 1 K. B. 734.

(*z*) *Carisbrook Co.* v. *London Co.*, [1902] 2 K. B. 681.

(*a*) *Dobson* v. *Wilson* (1813), 3 Camp. 480; 14 R. R. 817.

(*b*) *Brown* v. *Stapleton* (1827), 4 Bing. 119; 29 R. R. 524.

(*c*) *Grainger* v. *Martin* (1863), 4 B. & S. 9. See *Henderson* v. *Shankland*, [1896] 1 Q. B. 525.

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lost, at the place whence she sailed, after allowing for wear and tear up to the time of her loss (*c*). The nett freight consists of the clear earnings after deducting the expenses of the voyage, including wages. The goods are valued, if the vessel reaches her destination, at their selling price there, and if she puts back to the place where she loaded, at their invoice price.

Particular average.

A particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against, which is not a general average loss (*d*). Losses of this nature are borne by the owner of the thing damaged (*e*). The phrase "particular average" is used as showing that the particular owner has alone to bear the loss (*f*).

(*d*) S. 66 (7). Various definitions of particular average are stated in *Great Indian R. Co.* v. *Saunders* (1862), 1 B. & S. 51.

(*e*) See *The Copenhagen* (1799), 1 Rob. 289.

(*f*) See *Great Indian R. Co.* v. *Saunders*, *sup.*

CHAPTER VIII.

CHOSES IN ACTION.

Chap. VIII.

What is a "chose in action."

THE phrase "*chose in action*" is used in contradistinction to "chose in possession" (*a*). It is applied to rights of various kinds which have only one common characteristic, viz., that they do not confer the present possession of a tangible object. Hence, there is no uniformity in the use of the term, and its application has to be ascertained from the context in which it occurs. In its most extended sense it is sometimes used to include any personal property of an incorporeal nature, such as shares in a company, patents, copyright, &c. (*b*). Sometimes it denotes the rights of the person entitled to property, sometimes the property over which he has rights, and sometimes the instrument which evidences those rights (*c*).

Where the term *chose in action* occurs in a statute, the context may show that it is not to be taken in its widest meaning (*d*).

Originally the phrase indicated a right to recover a debt or some other thing by action in a court of common law. But, with the development of new forms of property, the term has been extended to cover a miscellaneous number of rights capable of being reduced to a money value. It furnishes an instance of the subject-matter of property having outgrown its nomenclature.

Blackstone says (*e*):—

"Property in chattels personal may be either in possession,

(*a*) See *ante*, p. 2.

(*b*) *Colonial Bank* v. *Whinney* (1885-6), 30 Ch. D. 261; 11 App. Cas. 426; *Fleet* v. *Perrins* (1869), L. R. 4 Q. B. 500. See also 9 L. Q. R. 311; 10 L. Q. R. 143, 303; 11 L. Q. R. 64, 223, 238.

(*c*) Elph. Introd. ch. 7, pt. 2.

(*d*) *Colonial Bank* v. *Whinney*, *sup.*

(*e*) 2 Bl. 389.

where a man hath not only the right to enjoy but hath the actual enjoyment of the thing, or else it is in action, where a man hath a bare right without any occupation or enjoyment" (*f*).

This definition would include the rights of a person out of possession of a specific corporeal chattel, as, for instance, the rights of a bailor, which, being transferable at common law, *e.g.*, by sale of the chattel, were not commonly regarded as being a "chose in action"; but the term is usually restricted to certain rights to the payment of money.

The rights of the owner of a specific chattel of which he has not the possession are very different from the rights of a person to whom money is due. Where a specific chattel is bailed, the owner can sell it, and by the sale the property passes to the buyer subject to the possessory rights of the bailee (*g*). If the bailee wrongfully delivers the goods to a stranger so as to determine the bailment (*h*), the bailor can maintain an action for the injury done to his right to possess against both the bailee and the stranger, unless the latter bought them from the bailee in market overt. As we have already seen (*i*), a person from whom goods have been stolen can maintain an action against an innocent person in whose hands they are. On the other hand, a person to whom money is due cannot generally at common law (although it is otherwise in equity and by statute) transfer his right to sue for it to a stranger.

Again, it may be observed that there is a difference between a specific corporeal chattel and money due, inasmuch as the latter may not be in existence, or may never exist in the form of a specific corporeal thing; a debt may be paid by bank notes or cash which were not printed or coined at the time when it was incurred; or it may even be discharged by entries in books.

(*f*) *I.e.*, without possession. See *Purdew* v. *Jackson* (1824), 1 Russ. 44; 25 R. R. 1; *Re Thynne*, [1911] 1 Ch. 282. For a good example of the distinction, see *Flower's Case*, Noy, 67.

(*g*) *Franklin* v. *Neate* (1844), 13 M. & W. 481; *ante*, p. 27.

(*h*) *Ante*, p. 29.

(*i*) *Ante*, p. 54.

Formerly the phrase " chose in action real " was applied to a right of entry on land (*k*); but at the present day the phrase " chose in action " is restricted to rights over personal property. It is, however, necessary to remember that (i) a mortgage debt is not the less a *chose in action* because it is secured on real estate; and (ii) a contract relating to realty creates a chose in action. This may perhaps be explained by the fact that at law the only remedy for breach of contract was in damages, which are personal property.

Choses in action considered as rights.

If we regard choses in action as consisting of rights, they comprise :—

(1) Rights under a contract (*l*);
(2) Rights to money payable otherwise than under a contract (*m*); as, for example, money payable under an order of Court.

Choses in action considered as things.

On the other hand, if we regard choses in action as consisting of the things over which rights are exercisable, they comprise,

(1) money recoverable under a contract, or as damages for breach of contract;
(2) debts of record; judgment debts;
(3) occasionally, in an extensive application of the term, shares and stock in companies (*n*), also patents, copyrights, and other things of an incorporeal nature (*o*). This extensive use of the term is rare at the present day and occurs only where the intention is to distinguish incorporeal things from " choses in possession."

As to money recoverable under a contract, or as damages for breach of contract, Blackstone says (*p*) :—

" Money due on a bond is a chose in action: for a property

(*k*) Bro. Ab. tit. *Choses in Action and Suspense*, 141, pl. 14.

(*l*) See *Coombs* v. *Manchester Brewery Co.*, [1901] 2 Ch. 608; and *Torkington* v. *Magee*, [1902] 2 K. B. 427; [1903] 1 K. B. 644.

(*m*) The right to recover damages in respect of a tort is not called a chose in action.

(*n*) *Colonial Bank* v. *Whinney* (1886), 11 App. Cas. 426. *Post*, Chap. XV.

(*o*) *British Mutoscope Co.* v. *Homer*, [1901] 1 Ch. 671.

(*p*) 2 Bl. 397.

in the debt vests at the time of forfeiture mentioned in the obligation; but there is no possession till recovered by course of law. If a man promises or covenants with me to do any act and fails in it, whereby I suffer damage, the recompense for this damage is a chose in action; for, though a right to some recompense vests in me at the time of the damage done, yet what and how large such recompense shall be can only be ascertained by verdict, and the possession can only be given to me by legal verdict and execution."

Some of the more important choses in action are specialty debts, simple contract debts (which include moneys secured by bills of exchange, promissory notes and cheques (*q*)), debts of record, judgment debts (*r*), and moneys payable under policies of insurance (*s*).

A specialty debt is one created by a contract under seal, *i.e.*, by deed; a simple contract debt is one which is created by writing not under seal, or by an oral contract, express or implied, and which is not of record.

Choses in action may be classified:—

Choses in action, legal and equitable.

First, according to the manner in which the rights of the person entitled to the chose in action can be enforced.

If the rights can be enforced at law, the chose in action is called a legal chose in action, as, for instance, where it is a debt. If they can be enforced in equity only, the chose in action is called an equitable chose in action, as, for instance, a legacy (*t*). So, if a mortgage debt, or railway stock, be vested in trustees on trust to pay the interest or dividends to A., A.'s right to the interest or dividends is enforceable in equity only, and therefore it is an equitable chose in action, while, as the trustees have a legal right to sue for the interest or dividends, their right is a legal chose in action.

Reversionary chose in action.

Where the right, whether legal or equitable, is to the future enjoyment of personal property, it is called a reversionary chose in action; an example is afforded by a policy of insurance, by virtue of which moneys are to be paid on the death of a living person.

Assignment of choses in action.

Secondly.—Choses in action can also be classified

(*q*) *Post*, Chap. X.

(*r*) *Post*, Chap. IX.

(*s*) *Post*, Chap. XI.

(*t*) *Deeks* v. *Strutt* (1794), 5 T. R. 690.

according to the manner in which, prior to the Judicature Acts (*u*), they were assignable. There were four classes: (1) those assignable at common law; (2) those assignable in equity only; (3) those assignable by statute; (4) those incapable of being assigned either at law or in equity (*x*).

Choses in action not assignable at common law.

Generally speaking, choses in action were not assignable at common law, that is to say, if A. assigned his chose in action to B., B. could not maintain an action in his own name against the debtor. Coke states (*y*) the reason to be,—"For that would be the occasion of multiplying of contentions and suits, of great oppression of the people, and the subversion of the due and equal execution of justice." A better explanation of the rule, however, is that it is "a logical consequence of the archaic view of a contract, as creating a strictly personal obligation between the creditor and the debtor" (*a*); or that (*b*) at common law the ownership, whether of land or of chattels, could be transferred only by delivery of possession, and that therefore it could not be transferred at all where delivery of possession was impossible, unless in the exceptional case where it was transferred to a person already in possession. If the latter view be correct, the reason why the owner of a chose in action was unable to assign it at common law was that, owing to its having a mere notional existence, it was impossible to deliver possession of it.

Exceptions.

There were, however, a few exceptional cases where choses in action were assignable at law.

By and to the Crown.

The Crown has always been able to assign choses in action that are certain, such as an ascertained debt, so that the grantee can sue in his own name (*c*), but not

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(*u*) The Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, came into operation in 1875.

(*x*) See generally on assignment of choses in action the notes to *Ryall* v. *Rowles* (1749), 1 W. & T. L. C. (ed. 9), 97; *Tolhurst* v. *Associated, &c. Co.*, [1902] 2 K. B. 660; [1903] A. C. 414. Salmond and Winfield, Contracts, Chap. XV., ss. 121—127.

(*y*) *Lampet's Case* (1612), 10 Rep. 48*a*.

(*a*) Pollock on Contract.

(*b*) This view was suggested by Prof. Maitland in 2 L. Q. R. 481.

(*c*) Y. B. 39 Hen. 6, 26.

those that are uncertain, as damages before they are ascertained (*d*). A chose in action could always be assigned to the Crown (*e*).

Annuities, etc.

An annuity is assignable at common law (*f*); bills of exchange, which include cheques on a bank (*g*), and exchequer bills to bearer (*h*), were assignable by the law merchant, which has become part of the law of England (*i*).

Assignment in equity.

All choses in action, except those which are altogether incapable of being assigned, can be assigned in equity; and, prior to the Judicature Act, 1873, this was the only method of assigning choses in action not assignable at law. In the following paragraphs we shall discuss the law prior to that Act.

Before Judicature Act.

An equitable assignment of a legal chose in action for value (*k*) had the effect of an agreement by the assignor with the assignee to permit the latter to bring an action in the assignor's name to recover the chose in action, which agreement a Court of Equity would enforce specifically on the terms of an indemnity by the assignee to the assignor against the costs (*l*). If the chose in action was equitable, the assignee could sue in equity in his own name and in his own right; but, where it was legal, a Court of Equity would not entertain a suit by the assignee (*m*) in the absence of special circumstances rendering it impossible or difficult for him to proceed at law, as, for instance, where the assignor declined to allow him to sue in his name, or did or threatened to do

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(*d*) See the cases collected in Vin. Ab. tit. *Prerogative of the King* (M. b. 9); *Breverton's Case* (1536), Dy. 30*b*; *Lambert* v. *Taylor* (1825), 4 B. & C. 138. Also Chitty on the Prerogative, 387.

(*e*) Per Parker, C.J., *Myles* v. *Williams* (1714), Gilb. Rep. K. B. 321.

(*f*) Co. Litt. 144*b*, note 1 (by Hargrave); *Baker* v. *Brooke* (1548), 1 Dy. 65*a*; Moore, 5, pl. 18; *Maund's Case* (1601), 7 Rep. 28*b*.

(*g*) Per Jessel, M.R., *Hopkinson* v. *Forster* (1875), 19 Eq. 76.

(*h*) *Wookey* v. *Pole* (1820), 4 B. & Ald. 1; 22 R. R. 594.

(*i*) Co. Litt. 182*a*. As to bills of lading, see *ante*, p. 88.

(*k*) *Ward* v. *Audland* (1845), 8 Beav. 201.

(*l*) *Row* v. *Dawson* (1749), 1 Ves. sen. 331; 1 W. & T. L. C. 87; *Crouch* v. *Credit Foncier* (1873), L. R. 8 Q. B. 380.

(*m*) *Rose* v. *Clarke* (1842), 1 Y. & C. C. C. 534; *Keys* v. *Williams* (1838), 3 Y. & C. Ex. 462; 51 R. R. 339.

something which would prevent him from recovering in an action at law in his name (*n*).

Assignment of after-acquired property.

Where a man who is not the owner of property purports to assign it, the attempted assignment cannot operate as a conveyance of the legal interest in the property, but it may operate as a contract to assign it when he becomes the owner of it; and in this case, if he has received the consideration, the instant that the property belongs to him, Equity, treating that which ought to be done as done, fastens on the property, and the contract to assign becomes an assignment (*o*), but an assignment of the equitable interest only, so that if, before the assignee acquires the legal interest (*e.g.*, in the case of moveable chattels by acquiring possession), some other person acquires the legal interest as a purchaser for value without notice, his rights have priority over those of the assignee (*p*).

An assignment of, or covenant to assign, future property, if for valuable consideration, will be enforced as to all property which falls within the general descriptive words of the assignment, however wide and comprehensive they may be (*q*), if they are not too vague and general (*r*). It has been said that an assignment of *all* future property may be invalid, but this question seems still to be open (*s*). But a voluntary assignment of future property, as it is equivalent merely to a contract to assign, will not be enforced (*t*).

Assignment how made.

No particular form is required for an assignment in equity of a chose in action (*u*). For instance, " an order

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(*n*) *Hammond* v. *Messenger* (1838), 9 Sim. 327.

(*o*) *Collyer* v. *Isaacs* (1882), 19 Ch. D. 342; *Re Clarke* (1887), 36 *id.* 348; *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523; *Re Turcan* (1889), 40 Ch. D. 5.

(*p*) *Joseph* v. *Lyons* (1885), 15 Q. B. D. 280; *Hallas* v. *Robinson* (1885), *id.* 288.

(*q*) *Tailby* v. *Official Receiver*, *sup.*; *Re Turcan*, *sup.*

(*r*) *Re Reis*, [1904] 2 K. B. 769.

(*s*) *Re D'Epineuil* (1882), 20 Ch. D. 758; *Tailby* v. *Official Receiver*, *sup.*; *Re Turcan*, *sup.*; *Re Reis*, *sup.*; cf. *Re Dent*, [1923] 1 Ch. 113.

(*t*) *Re Ellenborough*, [1903] 1 Ch. 697.

(*u*) *Row* v. *Dawson*, *sup.*; Salmond & Winfield, 403.

given by a debtor to his creditor upon a third person, having funds of the debtor, to pay the creditor out of such funds, is a binding equitable assignment of so much of the fund" (*v*), and so is a direction by a creditor to his debtor to pay the debt to a third person (*x*). An intended assignment by deed which proves to be inoperative may be a good equitable assignment (*y*).

Notice necessary to perfect assignment as to third persons.

As between the assignor and assignee, the equitable assignment of a *chose in action* is effectual without any notice to the debtor or trustee (*z*); but, as between the assignee and the debtor or trustee and other persons subsequently acquiring an interest in the debt or trust fund, it is incomplete until the debtor or trustee receives notice, which might have been of an informal nature (*a*), of the assignment. Now, by sect. 137 (3) of the Law of Property Act, 1925, the notice, to be effective as against third parties, must be in writing; and elaborate provision is made for securing that a memorandum of the transaction shall be recorded so as to operate as notice, where for any reason a valid notice cannot be given or cannot be served without unreasonable cost or delay (*b*). At any time before notice the debtor or trustee may discharge himself by payment to the assignor or his subsequent assignee, the result being that the priority between successive assignees is determined not by the date of the assignments, but by the date at which notice is acquired (*c*); except where no notice is given of any

Priorities.

(*v*) Per Cottenham, C., *Burn* v. *Carvalho* (1834), 4 My. & Cr. 702; 48 R. R. 213; *Addison* v. *Cox* (1873), 8 Ch. 76; *Durham* v. *Robertson*, [1898] 1 Q. B. 765; *Alexander* v. *Steinhardt*, [1903] 2 K. B. 208; *Re Gunsbourg* (1919), 88 L. J. K. B. 479.

(*x*) *Brandts* v. *Dunlop Co.*, [1905] A. C. 454.

(*y*) *Re Briggs & Co.*, [1906] 2 K. B. 209.

(*z*) *Re Patrick*, [1891] 1 Ch. 82. Whether the case is within the Judicature Act (*Gorringe* v. *Irwell* (1887), 34 Ch. D. 128), or not (*Burn* v. *Carvalho* (1834), 4 My. & Cr. 690; 48 R. R. 213; *Hobson* v. *Bell* (1839), 2 Beav. 17; 50 R. R. 90).

(*a*) *Lloyd* v. *Banks* (1868), 3 Ch. 489; *Ex p. Agra Bank* (1868), 3 Ch. 562; *Bence* v. *Shearman*, [1898] 2 Ch. 582; *Bateman* v. *Hunt*, [1904] 2 K. B. 530.

(*b*) 15 Geo. 5, c. 20, s. 137.

(*c*) *Dearle* v. *Hall* (1823), 3 Russ. 1; 27 R. R. 1; *Loveridge* v. *Cooper* (1823), 3 Russ. 30; 27 R. R. 1; *Re Freshfield* (1879), 11 assignment, in which case the assignments will rank according to their dates. The priority which a second assignee of an equitable interest in a fund, who has given notice of his assignment to the trustees, possesses over a first assignee who has not given notice, subsists equally where the second assignment is from the legal personal representative of the *cestui que trust*, and not from the *cestui que trust* himself (*e*).

In like manner the title of the trustee in bankruptcy of the person entitled to an equitable chose in action will be postponed to his assignee without notice of the act of bankruptcy, if the latter gives notice to the debtor or trustee of the fund before the trustee in bankruptcy does so (*f*).

Assignee with notice of prior assignment.

Every assignee of a chose in action takes it subject to the rights conferred by any prior assignment of which he had notice at the time of the assignment to himself, whether notice of such prior assignment is or is not given to the trustee or debtor (*g*); and he is considered to have notice of every prior assignment which he could discover by inquiry from the trustee or debtor (*h*), though a trustee is not bound to answer such inquiry (*i*). A proposed assignee must make inquiry of all the trustees (*i*).

An assignee, however, who has given notice to all the trustees in existence at the date of his assignment, retains his priority over a subsequent assignee who has taken his assignment after the death or retirement of

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Ch. D. 198; *Ward* v. *Duncombe*, [1893] A. C. 369; *Marchant* v. *Morton*, [1901] 2 K. B. 829. See 11 L. Q. R. 337; Law of Property Act, 1925, s. 137.

(*e*) *Re Freshfield*, *sup.*; *Montefiore* v. *Guedalla*, [1903] 2 Ch. 26.

(*f*) *Palmer* v. *Locke* (1881), 18 Ch. D. 381.

(*g*) *Warburton* v. *Hill* (1854), Kay, 470; *Newman* v. *Newman* 1885), 28 Ch. D. 674.

(*h*) *Willes* v. *Greenhill* (1861), 4 De G. F. & J. 147, 150; *Ward* v. *Duncombe*, *sup.*

(*i*) *Low* v. *Bouverie*, [1891] 3 Ch. 92. But s. 137 (8) of the Law of Property Act, 1925, provides that any person interested in an equitable interest in property may require production of any written notice affecting such interest which has been served on the trustee.

all those trustees and has given notice to the new trustees (*k*).

Notice to one of several trustees or debtors.

Notice of an assignment given to one of several trustees or debtors is sufficient, though it be not communicated to any other trustee or debtor, unless it be to the interest of the person receiving the notice to conceal the assignment (*l*). If, however, the trustee to whom notice has been given has died or retired before an assignment to a subsequent assignee, the subsequent assignee may obtain priority by giving notice (*m*).

Notice must be given to the person who is trustee for the assignor, and not to any person who may happen to be holding the property as a trustee (*n*).

Stop orders on funds in Court.

Where the chose in action is a fund in Court, by obtaining a stop order the assignee can protect his interest to the same extent as if the fund had been in the hands of trustees for the assignor and notice had been given to them; and notices given to the trustees before the fund was paid into Court remain effectual (*o*). The effect of the stop order is to prevent the transfer or payment of the fund without notice to the assignee who obtained the order (*p*).

Assignment of chose in action is subject to equities.

The assignee of a chose in action takes it subject to all equities existing between the assignor and the debtor or trustee at the time when the assignment becomes binding on the latter (*q*). The debtor or trustee cannot set up any equities that arise against the assignor after notice of the assignment, even if they arise out of a

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(*k*) *Re Wasdale*, [1899] 1 Ch. 163.

(*l*) *Meux* v. *Bell* (1841), 1 Ha. 73; *Ward* v. *Duncombe*, *sup.* See *Willes* v. *Greenhill*, *sup.*

(*m*) *Re Phillips*, [1903] 1 Ch. 183.

(*n*) *Stephens* v. *Green*, [1895] 2 Ch. 148.

(*o*) *Pinnock* v. *Bailey* (1883), 23 Ch. D. 497; *Mutual Society* v. *Langley* (1886), 32 Ch. D. 460; *Stephens* v. *Green*, *sup.*; *Mack* v. *Postle*, [1894] 2 Ch. 449.

(*p*) See R. S. C., Ord. XLVI. rr. 12, 13; Seton on Judgments, Chap. 28, s. 3; note to *Ryall* v. *Rowles*, 1 W. & T. L. C. 130; *Stephens* v. *Green*, *sup.*; *Stoddart* v. *Union Trust*, [1912] 1 K. B. 181.

(*q*) *Cavendish* v. *Geaves* (1857), 24 Beav. 163; *Rolt* v. *White* (1862), 3 De G. J. & Sm. 360; *Christie* v. *Taunton*, [1893] 2 Ch. 175; Salmond & Winfield, 416 *et seq.*

liability existing at the time of the notice (*r*); but he may set off sums of money then already due and becoming payable subsequently (*s*).

So also where a trustee assigns, absolutely or by way of a mortgage, a beneficial interest which he has in the trust fund, the assignee takes it subject to the right of other beneficiaries to have the assignor's interest applied in recouping a breach of trust committed by him, though subsequent to the assignment (*t*).

Negotiable instruments, the peculiar nature of which is explained in a subsequent chapter (*u*), form an exception to the rule that the assignee of a chose in action takes it subject to equities.

Chose in action made, by contract, assignable free from equities.

It is competent for the debtor to preclude himself from setting up as against assignees any equities that he would have had against the original creditor (*x*); and he may do this by contract, either express or implied, made either with the original creditor (*y*), or, after notice of the assignment, with his assignee (*z*). This result is sometimes arrived at on the ground of estoppel.

Choses in action transferable by statute.

It has generally happened that where a new kind of chose in action is created by statute it is expressly made transferable at law in a specified manner, and, where this is the case, it can, generally speaking, be transferred in equity also. By "transferable at law" is meant that the transferee is enabled to maintain an action in his own name.

Examples of this are afforded by the public funds, legal transfers of which can be effected only by entries made in the transfer books at the Banks of England or

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(*r*) *Watson* v. *Mid-Wales R. Co.* (1867), L. R. 2 C. P. 593; *Christie* v. *Taunton*, *sup.*; *Stoddart* v. *Union Trust*, *sup.*

(*s*) *Jeffryes* v. *Agra Bank* (1866), 2 Eq. 674; *Ex p. Mackenzie* (1869), 7 Eq. 240.

(*t*) *Doering* v. *Doering* (1889), 42 Ch. D. 203; *Bolton* v. *Curre* (1894), 70 L. T. 759.

(*u*) *Post*, Chap. X.

(*x*) *Ex p. Asiatic Bank* (1867), 2 Ch. 391; Salmond and Winfield, 420.

(*y*) *Re Blakely Co.* (1868), 3 Ch. 154; *Higgs* v. *Assam Co.* (1869), L. R. 4 Ex. 387.

(*z*) *Re Northern Assam Co.* (1870), 10 Eq. 458; *Ex p. Chorley* (1871), 11 Eq. 157.

Ireland and signed by the party making the transfer or his attorney (*a*), or, if the stockholder obtains a stock certificate, by delivery of the certificate (*b*).

Assignment of shares in corporations or companies.

A member of a corporation cannot assign his interest in the corporate property and introduce his assignee into the corporation without statutory authority (*c*). Such authority is expressly given in the case of companies regulated by the Companies Clauses Consolidation Act, 1845, which provides for the transfer of shares in the company by deed delivered to the secretary, and the entry of a memorial thereof by the secretary of the company in the "register of transfers" (*d*). Mortgages and bonds (commonly called debentures) of the company issued under the powers of the same Act are transferable at law by registered deed (*e*).

The shares of a company registered under the Companies Act, 1929, are transferable in the manner prescribed by the regulations of the company, *i.e.*, generally by the execution of an instrument of transfer registered in the books of the company (*f*).

Shares of a company.

It has been said that, in the case of shares in a company registered under the Companies Acts, notices given to the company of equitable interests or trusts would be absolutely inoperative to affect the company with any trust, by reason of the provision on the subject now re-enacted in s. 101 of the Act of 1929 (*g*). Where, however, the company has a lien or charge upon the shares for debts due from the holder, notice from an equitable assignee of shares given to the company will

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(*a*) The National Debt Act, 1870 (33 & 34 Vict. c. 71), s. 22.

(*b*) *Ib.* Part V., as extended by 2 Edw. 7, c. 7, s. 11.

(*c*) *Duvergier* v. *Fellows* (1828), 5 Bing. 267; 34 R. R. 578; *Blundell* v. *Winsor* (1837), 8 Sim. 601; 42 R. R. 242. As to incorporated companies, see Lindley on Companies, Bk. III., ch. 4, s. 5; s. 2 of the Companies Act, 1929 (19 & 20 Geo. 5, c. 23); *Smith* v. *Anderson* (1880), 15 Ch D. 247; *post*, Chap. XV.

(*d*) 8 & 9 Vict. c. 16, ss. 14, 15; *Nanney* v. *Morgan* (1887), 35 Ch. D. 598; 37 *id.* 346.

(*e*) *Ib.* ss. 46, 47; *Vertue* v. *East Anglian R. Co.* (1850), 5 Ex. 280.

(*f*) *Post*, Chap. XV.

(*g*) *Société de Paris* v. *Walker* (1886), 11 App. Cas. 20, 30, per Lord Selborne.

prevent the company from claiming priority in respect of debts incurred after such notice (*h*).

Distringas 5 Vict. c. 5.

The equitable assignee of shares should protect himself by proceedings under the Act 5 Vict. c. 5, by filing an affidavit and notice in the prescribed form in the Central Office of the Supreme Court, and serving an office copy of the affidavit and a duplicate notice on the company (*i*).

The Rules provide that the service on the company shall have the same force and effect against the company as a writ of *distringas* duly issued under the Act 5 Vict. c. 5, s. 5, would have had (*k*); that is, to prevent the fund being dealt with without the person who issued the writ having an opportunity of asserting his claim (*l*). This effect of the notice served under the new procedure is temporary only; and it should be followed up by obtaining an order under s. 4 of 5 Vict. c. 5 (*m*), upon motion or petition in a summary way, without action, to restrain the company from permitting the transfer of the stock or shares, or from paying any dividend or dividends due or to become due thereon.

Other choses in action assignable by statute.

The following classes of choses in action have been made assignable at law by statute, so as to enable the assignee to sue in his own name:—

Promissory notes were made transferable by indorsement (*o*).

Policies of life insurance were made transferable by assignment by an instrument in the words or to the effect prescribed (*p*), on written notice of the date and purport of the assignment being given to the insurance company at their principal place of business for the time being; and the dates of the receipt of notice are to

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(*h*) *Bradford Bank* v. *Briggs* (1887), 12 App. Cas. 29.

(*i*) R. S. C., Ord. XLVI.

(*k*) Ord. XLVI., r. 8.

(*l*) See per Stuart, V.-C., in *Wilkins* v. *Sibley* (1863), 4 Giff. 446, 447.

(*m*) See *Re Blaksley* (1883), 23 Ch. D. 549; *Re Prynne* (1886), 53 L. T. 465; cf. *Hobbs* v. *Wayet* (1887), 36 Ch. D. 256.

(*o*) 3 & 4 Anne, c. 8; Bills of Exchange Act, 1882.

(*p*) See *Spencer* v. *Clarke* (1878), 9 Ch. D. 137.

regulate priority of claims under assignments (*q*), as between the company and the assignees (*r*).

Policies of friendly societies were excepted from the Act of 1867, but they are assignable in the ordinary way and also by way of " nomination " under the provisions of the Friendly Societies Acts (*s*).

A marine policy, that is, a contract of insurance against marine losses, is assignable, unless it contains terms expressly prohibiting assignment, so as to enable the assignee to sue in his own name (*t*). It may be assigned either before or after loss (*t*); but an assignment after the assignor has parted with his interest in the property is not valid, unless at the time he parted with the property the assignor expressly or impliedly agreed to assign the policy (*t*).

Administration bonds are made assignable, on breach, by order of Court (*u*).

Under the provisions of many other modern statutes, various securities for the payment of money have been made assignable.

Vesting of choses in action in new trustees.

Under the Trustee Act, 1925, the right to recover and receive any debt or other thing in action subject to a trust will, on the appointment of a new trustee, without any assignment, vest in the trustees, if the deed appointing the new trustee contains a declaration by the appointor that it shall so vest, and, in the case of deeds made after the commencement of the Act, subject to any express provision to the contrary therein contained, will so vest in the trustees, even without such a declaration (*x*); and the like effect follows where a deed by which a retiring trustee is discharged under the Act contains such a declaration by the retiring and continuing trustees and by the other person, if any, empowered to

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(*q*) The Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144).

(*r*) *Newman* v. *Newman* (1885), 28 Ch. D. 674.

(*s*) *Re Griffin*, [1902] 1 Ch. 135.

(*t*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), ss. 50, 51. See *Baker* v. *Adam* (1910), 102 L. T. 248.

(*u*) 20 & 21 Vict. c. 77, ss. 81, 83; 21 & 22 Vict. c. 95. s. 15: *Cope* v. *Bennett*, [1911] 2 Ch. 488.

appoint trustees, and, when made after the commencement of the Act, without such declaration, subject, however, to any express provision to the contrary therein contained (*y*). But these provisions do not extend to "any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner prescribed by or under Act of Parliament" (*z*); this exception being for the purpose of reserving to companies and other bodies the right to require transfers to be made in the statutory or prescribed form.

Assignment of debts and choses in action under Judicature Act, 1873, and Law of Property Act, 1925.

It is provided by the Law of Property Act, 1925 (*a*), that :—

> "Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice, (a) the legal right to such debt or thing in action; (b) all legal and other remedies for the same; and (c) the power to give a good discharge for the same without the concurrence of the assignor."

It will be observed that, in order to make an assignment of a chose in action valid at law by virtue of the Act, four things are necessary :—

(1) The assignment must be in writing signed by the assignor.

(2) It must be absolute, not purporting to be by way of charge only.

A mortgage of a debt due to the mortgagor, made in the ordinary form of a conveyance with a proviso for redemption, is "an absolute assignment, not purporting

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(*x*) S. 40 (1). This Act repealed and re-enacted the provisions of s. 12 of the Trustee Act, 1893.

(*y*) S. 40 (2).

(*z*) S. 40 (3).

(*a*) S. 136, replacing 36 & 37 Vict. c. 66, s. 25 (6), which is repealed. As to the effect of s. 25 (6), see *Re Westerton*, [1919] 2 Ch. 104.

to be by way of charge only," within this section (*b*), and the result is the same where there is an assignment subject to a trust (*c*), for the mortgagee or the trustee, as the case may be, is in a position to give a valid legal discharge on payment of the debt to him. The assignment must in every case be *absolute* (*d*), and probably must be of the *whole* debt or other chose in action (*e*), or at any rate of a *definite* part of the debt (*f*).

(3) The chose in action must be legal (*g*).

The words "debt or other legal chose in action" mean "debt or right which the common law looks on as not assignable by reason of its being a chose in action, but which a Court of Equity deals with as being assignable" (*h*). "An assignment of a mere right of litigation is bad (*i*); but an assignment of property is valid, even although that property is incapable of being recovered without litigation" (*k*). Thus an executory contract of purchase, of which there has been no breach, so that no action can be brought upon the contract, but which must if necessary be enforced by action, is a chose in action assignable under this section (*k*); and so is a claim, under s. 68 of the Lands Clauses Act, 1845, for compensation for injuriously affecting land (*l*).

(4) Notice in writing of the assignment must be given to the debtor or trustee (*m*).

(*b*) *Tancred* v. *Delagoa Bay Co.* (1889), 23 Q. B. D. 239; *Durham* v. *Robertson*, [1898] 1 Q. B. 765; see also *Bank of Liverpool* v. *Holland* (1926), 43 T. L. R. 29.

(*c*) *Comfort* v. *Betts*, [1891] 1 Q. B. 737; *Wiesener* v. *Rackow* (1897), 76 L. T. 448.

(*d*) *Mercantile Bank* v. *Evans*, [1899] 2 Q. B. 613; *Hughes* v. *Pump House Co.*, [1902] 2 K. B. 190; *Re Williams, Williams* v. *Ball*, [1917] 1 Ch. 1.

(*e*) *Durham* v. *Robertson*, *sup.*; *Re Steel Wing Co.*, [1921] 1 Ch. 349.

(*f*) *Jones* v. *Humphreys*, [1902] 1 K. B. 10; *Skipper* v. *Holloway*, [1910] 2 K. B. 630; *Forster* v. *Baker*, *id.* 636; *Re Gunsbourg* (1919), 88 L. J. K. B. 479.

(*g*) See *King* v. *Victoria Co.*, [1896] A. C. 250.

(*h*) *Torkington* v. *Magee*, [1902] 2 K. B. 427; [1903] 1 K. B. 644.

(*i*) *Defries* v. *Milne*, [1913] 1 Ch. 98.

(*k*) *Dawson* v. *G. N. & C. R.*, [1905] 1 K. B. 260, 271; see *May* v. *Lane* (1895), 64 L. J. Q. B. 236; *Swan Co.* v. *Maritime Co.*, [1907] 1 K. B. 116.

(*l*) *Dawson* v. *G. N. & C. R.*, *sup.*

(*m*) *Hockley and Papworth* v. *Goldstein* (1920), 36 T. L. R. 539.

The effect is that, until the prescribed notice is given, the assignee must sue in the same manner as if the Act had not been passed, *i.e.*, in the name of the assignor; but after the prescribed notice is given, he can sue in his own name. And the notice produces its full effect even if not given till after the death of the assignor (*n*), or, after the death of the assignee, by his executor (*o*).

Where an assignment is perfected according to the Act, an assignee takes subject to all equities capable of being enforced by the trustee or debtor against him at the date of the assignment (*p*), and it follows that an assignment perfected according to the Act confers no new rights on the assignee, but merely gives him a new way of enforcing his rights (*q*).

Exceptional contracts not assignable.

Occasionally the subject-matter of a contract is such as to render it incapable of transfer either at law or in equity; as where the contract involves personal skill or confidence, *e.g.*, a contract between an author and a publisher that the one shall write and the other publish a book (*r*); or where it may make a difference to the party on whom the obligation lies to which of two persons he is to discharge it (*s*); or where it relates to personal requirements (*t*).

Assignment against public policy.

In some cases an assignment is void as being against public policy.

> "There are various cases in which public duties are concerned in which it may be against public policy that the income arising for the performance of those duties should be assigned; and for this simple reason, because the public is interested not only in the performance from time to time of the duties, but only in the fit state of preparation of the party having to perform them. Such is the reason in the cases of

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(*n*) *Walker* v. *Bradford Bank* (1884), 12 Q. B. D. 511.

(*o*) *Bateman* v. *Hunt*, [1904] 2 K. B. 530.

(*p*) *Ante*, p. 162.

(*q*) *Grundy* v. *Broadbent*, [1918] 1 Ir. R. 433.

(*r*) Per Abinger, C.B., *Gibson* v. *Carruthers* (1841), 8 M. & W. 343; 58 R. R. 713; *Stevens* v. *Benning* (1854), 1 K. & J. 168; *Robson* v. *Drummond* (1831), 2 B. & Ad. 303; 36 R. R. 569; *Griffith* v. *Tower Co.*, [1897] 1 Ch. 21.

(*s*) *Tolhurst* v. *Associated, &c. Co.*, [1902] 2 K. B. 660; [1903] A. C. 414.

(*t*) *Kemp* v. *Baerselman*, [1906] 2 K. B. 604.

half-pay, where there is a sort of retainer and where the payments which are made to officers from time to time are the means by which they, being liable to be called into public service, are enabled to keep themselves in a state of preparation for performing their duties. . . . So, also, where a pension or remuneration is given for a purpose which tends less directly to the public benefit, as . . . the pension given to the Duke of Marlborough" (*u*).

Assignments forbidden by statute.

It is hardly necessary to state that assignments prohibited by statute are absolutely void. For instance, deferred pay or military reward payable to any officer or soldier of the army, royal marines, and His Majesty's Indian Forces, or any pension, allowance, or relief payable to any such officer or soldier, or his widow, child, or other relative, or to any person in respect of military service (with certain exceptions) (*x*).

(*u*) Per Lord Langdale, M.R., *Grenfell* v. *Dean of Windsor* (1840), 2 Beav. 549; 50 R. R. 279. See *Davis* v. *Marlborough* (1818), 1 Swanst. 79; 53 R. R. 29.

(*x*) The Army Act, 1881 (44 & 45 Vict. c. 58), s. 141. See *Lucas* v. *Harris* (1887), 18 Q. B. D. 127; *Crowe* v. *Price* (1889), 22 Q. B. D. 429.

CHAPTER IX.

DEBTS—GUARANTEES.

§ 1. *Debts.*

Chap. IX.

Debt must be ascertained sum—and due.

A DEBT is an ascertained sum of money due from one person to another. As a debt must be an *ascertained* sum, damages that may be recovered in an action are not a debt until their amount is ascertained by judgment (*a*). As the money must be *due*, rent, or the gale of an annuity, is not a debt till it becomes due (*b*). But a debt is not the less a debt because the payment is deferred until the happening of an event which must happen (*c*). On the other hand, a contract to pay a certain sum of money on the happening of an event which may never happen does not create a debt unless and until the event happens (*d*). A liability of this nature is sometimes called a contingent debt. A contract to lend money does not create a debt, and if the money is not lent the intended borrower is only entitled to damages for the actual loss caused by the breach of contract (*e*); but a contract with a limited company to take up and pay for any debentures of a company may be enforced by specific performance (*f*).

Contract to lend money.

Equitable debts.

An " equitable debt " is a liquidated sum of money owing in equity from one person to another (*g*), *e.g.*,

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(*a*) *Re Charles* (1811), 14 East, 197; *Jones* v. *Thompson* (1858), E. B. & E. 63.

(*b*) See Co. Litt. 292 b. Per Lindley, L.J., *Webb* v. *Stenton* (1883), 11 Q. B. D. 526.

(*c*) Co. Litt. 292 b; *Goss* v. *Nelson*, 1 Burr. 226; *Edmunds* v. *Edmunds*, [1904] P. 362. " Due " may mean either " owing " or " payable," according to the context; *Ex p. Kemp* (1874), 9 Ch. 383; *Re Stockton, &c. Co.* (1876), 2 Ch. D. 103.

(*d*) *Ex p. Kemp*, *sup.*; *Booth* v. *Trail* (1884), 12 Q. B. D. 8.

(*e*) *South African Territories* v. *Wallington*, [1898] A. C. 309.

(*f*) Companies Act, 1929, s. 76.

(*g*) Per Lindley, L.J., *Webb* v. *Stenton*, *sup.*

where a trustee holds a sum of money in trust for his *cestui que trust* absolutely; but "a trustee is not an equitable debtor to the *cestui que trust* until there is money in his hands which he ought to pay to his *cestui que trust*, or until he has made himself personally liable to pay money to his *cestui que trust* by reason of some breach of trust or default in the performance of his duties as trustee" (*h*).

Married woman.

A married woman is not in the position of an ordinary debtor, even though she has separate estate (*i*); she cannot be made a bankrupt unless she is carrying on a trade or business (whether separately from her husband or not) (*k*), and she cannot be committed to prison under the Debtors Act (*l*).

Money-lending.

Before 1854 there were many laws against usury, that is, lending money at interest, and restricting the rate of interest which might lawfully be taken (*m*), but in that year all the statutes and existing laws against usury were repealed (*n*). The Court of Chancery, however, continued to exercise its jurisdiction to relieve the class of persons known as "expectant heirs" from what it might consider to be unrighteous money-lending bargains (*o*).

Money-lenders Acts, 1900 and 1927.

Since the beginning of this century, however, the Legislature has thought it desirable to intervene to impose restrictions on transactions with money-lenders, with a view of preventing harsh and oppressive terms being imposed on borrowers and advantage being taken of their necessities. By the Moneylenders Act, 1900 (*p*), and the Moneylenders Act, 1927 (*q*), which repealed and

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(*h*) Per Fry, L.J., *id.* p. 530.

(*i*) *Re Grissell* (1884), 12 Ch. D. 490, per Cotton, L.J.; *Pelton* v. *Harrison*, [1892] 1 Q. B. 118.

(*k*) Bankruptcy Act, 1914, s. 125.

(*l*) *Scott* v. *Morley* (1888), 20 Q. B. D. 120.

(*m*) See Matthews, Law of Moneylending, Part 1.

(*n*) 17 & 18 Vict. c. 90.

(*o*) See *Chesterfield (Earl of)* v. *Janssen* (1750), 1 W. & T. L. C. (ed. 9) 248; *Nevill* v. *Snelling* (1880), 15 Ch. D. 679.

(*p*) 63 & 64 Vict. c. 51.

(*q*) 17 & 18 Geo. 5, c. 21.

substantially re-enacted the provisions of an amending Act of 1911 (*r*), it is provided in effect that when a money-lender (*s*) sues to recover a loan or enforce a security, or a borrower applies to the Court for relief, the Court, if satisfied that the interest or charges are excessive and the bargain harsh and unconscionable (*t*), or that the transaction is such that a Court of Equity would give relief, may relieve the borrower upon the terms of payment of what the Court adjudges to be fairly due, and to be reasonable in respect of the principal, interest and charges (*u*). The rights of any *bona fide* assignee or holder for value without notice are protected (*v*).

Harsh and unconscionable transactions.

Bona fide assignee. for value.

The Acts apply to every person whose business is that of money-lending or who advertises or announces himself or holds himself out in any way as carrying on that business, but do not apply to pawnbrokers in respect of business carried on in accordance with the Acts for the time being in force in relation to pawnbrokers, nor to persons carrying on the business of banking or insurance, nor to Friendly and Building Societies and some other bodies exempted from the operation of the Acts (*x*).

Money-lenders.

A money-lender must take out annually, in respect of every address at which his business is carried on, an excise licence in his true name, which must also show his authorised trade name and also his authorised address. Such licence is not to be granted except to persons holding a certificate, obtained from the petty sessional Court of the district or, in the metropolitan area, from a metropolitan police magistrate, showing certain particulars (*y*).

(*r*) Moneylenders Act, 1911 (1 & 2 Geo. 5, c. 38).

(*s*) Defined in s. 6 of Act of 1900. See *infra*.

(*t*) *Kruse* v. *Seeley*, [1924] 1 Ch. 136. See also *Horwood* v. *Millar's Co.*, [1917] 1 K. B. 305.

Interest exceeding the rate of 48 per cent. is to be deemed to be excessive unless the contrary is proved (Act of 1927, s. 10).

(*u*) Act of 1900, s. 1; *Samuel* v. *Newbold*, [1906] A. C. 461.

(*v*) Act of 1927, s. 17.

(*x*) Act of 1900, s. 6

(*y*) Act of 1927, ss. 1 and 2.

No contract made after the Act of 1927 came into operation for repayment of a loan or of interest on money lent, and no security given by a borrower in respect of such loan, is to be enforceable unless the borrower has personally signed a note or memorandum of the contract (*z*). Any contract for the loan of money by a money-lender made after the commencement of the Act of 1927, is to be illegal in so far as it provides directly or indirectly for the payment of compound interest or for the rate of interest being increased on default of payment.

Interest on debts.

It has never been the practice in English law to allow interest upon all debts merely on the ground of delay in payment (*b*), whether upon money lent or money due for goods sold (*c*), unless there is an agreement to that effect or it is sanctioned by mercantile usage; nor at common law could damages, other than nominal, be in general awarded for non-payment of such debts (*d*). But interest may in certain cases be payable on debts—(1) at common law, or (2) in equity, and (3) it may be payable as damages by statute (*e*).

At common law.

(1) At common law, and in equity, which, in this matter, " follows the law " (*f*), interest is not payable on a debt except (i) under an express contract to pay interest; (ii) under a contract implied from the course of dealing between the parties (*g*) or the usage of trade; (iii) under a written contract to pay a sum of money on demand, or on a certain day, interest is payable as from the time of demand made, or from the day appointed for payment (*h*); (iv) by the usage of trade, where the

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(*z*) Act of 1927, s. 6. (*a*) *Ib.* s. 7.

(*b*) Per Kay, L.J., *L. C. & D. R. Co.* v. *S. E. R. Co.*, [1892] 1 Ch. 148; [1893] A. C. 429.

(*c*) *Calton* v. *Bragg* (1812), 15 East, 223; 13 R. R. 451; *Re Edwards* (1892), 61 L. J. Ch. 22.

(*d*) See *Wilde* v. *Clarkson* (1795), 6 T. R. 304.

(*e*) See, as to interest, Leake on Contracts, Pt. V. Ch. I. s. 4.

(*f*) *Webster* v. *British Empire Co.* (1880), 15 Ch. D. 178, where the cases are collected; and *L. C. & D. R. Co.* v. *S. E. R. Co.*, *sup.*

(*g*) *Higgins* v. *Sargent* (1823), 2 B. & C. 348; 26 R. R. 379; *Re Anglesey*, [1901] 2 Ch. 548.

(*h*) *Lowndes* v. *Collens* (1810), 17 Ves. 27.

debt is secured by a bill of exchange or promissory note (*i*).

In equity.

(2) Interest is payable in equity on money wrongfully, fraudulently, or vexatiously obtained or retained (*k*), and Equity usually decrees interest in cases of purely equitable demands—for instance, in suits against trustees who misapply trust moneys, and in suits for equitable waste (*l*).

Money charged on land.

If in any settlement or contract there is " a provision that a sum of money is to be charged on land and the money is to be paid at a fixed time, the sum itself being fixed, then, as between the owner of the land and the person entitled to the money, although nothing is said in the settlement or contract as to interest," it may be claimed, as a rule, from the date fixed for payment of the money (*m*). This " is illustrated by loans upon the security of a memorandum of deposit of title deeds of land. There the money so charged bears interest whether there is an express provision for payment of interest or not. So in the case of portions raisable out of land at a fixed time and to a fixed amount; they certainly bear interest. So also legacies charged on land, which stand on a different footing from legacies not so charged, carry interest from the death " (*m*).

Trustees or executors improperly retaining trust moneys instead of investing or paying them over are generally charged with simple interest, and in some cases, under special circumstances, with compound interest (*n*).

Bond or mortgage debts.

Where the condition of a bond is for repayment of a sum of money at a fixed date with interest thereon (*o*), or where there is a covenant in a mortgage deed for payment of the mortgage debt at a fixed date and of

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(*i*) *Calton* v. *Bragg*, *sup.*

(*k*) *Meredith* v. *Bowen* (1836), 1 Keen, 270; *Pearse* v. *Green* (1819), 1 Jac. & W. 135; 20 R. R. 258; *Johnson* v. *Rex*, [1904] A. C. 817.

(*l*) *Phillips* v. *Homfray*, [1892] 1 Ch. 465.

(*m*) Per Romer, L.J., *Re Drax*, [1903] 1 Ch. 781.

(*n*) 2 Seton, 1164; *Re Sharpe*, [1892] 1 Ch. 169; *Christmas* v. *Jones*, [1897] 2 Ch. 190; *Re Barclay*, [1899] 1 Ch. 674.

(*o*) *Re Dixon*, [1900] 2 Ch. 561.

interest thereon in the meantime, but no covenant for payment of any subsequent interest, the Court will allow subsequent interest at the same rate, but apparently not so as to exceed £5 per cent. (*p*).

By statute.

(3) By the Civil Procedure Act, 1833 (*q*), upon all debts the jury may allow interest at the current rate from the time fixed for payment by the written instrument, if any, by virtue of which the debt is payable (*r*) at a time certain (*s*), or otherwise from the time when a written demand of payment has been made giving notice that interest will be charged from the date of demand (*t*). Also, the jury may give damages in the nature of interest over and above the value of the goods at the time of the conversion or seizure in all actions of trover or trespass to goods, and over and above the money recoverable in all actions on policies of assurance (*u*).

It will be observed that a discretion is given to the jury to say whether, under all the circumstances of a case, it is one in which interest ought to be allowed or not; and a judge of fact will act as a jury (*x*).

Interest on calls.

The liability of a person to contribute to the assets of a company being wound up under the Companies Act creates a debt (*y*); therefore a notice to a contributory of a call made in winding-up, requiring its payment by a given day and stating that if not paid by that day interest will be charged, will make interest to be payable on the call under the above statute (*z*).

(*p*) *Re Roberts* (1880), 14 Ch. D. 49. As to a mortgagee's right to six months' interest in lieu of notice to pay off, see *Smith* v. *Smith*, [1891] 3 Ch. 550; *Fitzgerald* v. *Mellersh*, [1892] 1 Ch. 385.

(*q*) 3 & 4 Will. 4, c. 42, s. 28. See *L. C. & D. R. Co.* v. *S. E. R. Co.*, [1892] 1 Ch. 140; [1893] A. C. 429.

(*r*) *Taylor* v. *Holt* (1864), 3 H. & C. 452.

(*s*) See *Re Horner*, [1896] 2 Ch. 188.

(*t*) *Ward* v. *Eyre* (1880), 15 Ch. D. 130; *Rhymney R. Co.* v. *Rhymney Iron Co.* (1890), 25 Q. B. D. 146; *Re Edwards* (1892), 61 L. J. Ch. 22.

(*u*) 3 & 4 Will. 4, c. 42, s. 29. See *Phillips* v. *Homfray*, [1892] 1 Ch. 465.

(*x*) See per Hall, V.-C., in *Hill* v. *S. Staffordshire R. Co.* (1874), 18 Eq. 170.

(*y*) See Companies Act, 1929, ss. 20 (2), 159.

(*z*) *Barrow's Case* (1868), 3 Ch. 784.

Bill of exchange.

There is a statutory provision as to payment of interest by way of damages where a bill of exchange is dishonoured (*a*).

Compound interest.

Compound interest cannot be claimed, except under a contract express or implied from the mode of dealing with former accounts or from custom (*b*).

Debts may be divided into (1) debts of record; (2) judgment debts; (3) specialty debts; and (4) simple contract debts.

Debts of record.

A debt of record is one which appears to be due on the inspection of the records of a Court of Record (*c*).

The principal debts of record are Crown debts (*d*), recognisances (*e*), and judgment debts.

Crown debts.

Crown debts are always entitled to priority, unless that prerogative right has been taken away by statute (*f*), as in the case of administration of an estate in bankruptcy (*g*); and a surety to the Crown, who has paid the debt of his principal, is entitled to the same priority (*h*).

Recognisances.

A recognisance of record is an obligation in the form of an acknowledgment made before a judge or other officer having authority for that purpose, and enrolled (*i*)

(*a*) *Post*, pp. 211-212.

(*b*) *Fergusson* v. *Fyffe* (1841), 8 Cl. & F. 121; 54 R. R. 12; *Crosskill* v. *Bower* (1863), 32 Beav. 86; *Williamson* v. *Williamson* (1869), 7 Eq. 542.

(*c*) "Every Court of Record is a King's Court, albeit another may have the profit": Co. Litt. 117 b; *ib*. 260 a. Some Courts can fine and imprison, some can fine only, as a court leet, some can neither fine nor imprison, as a court baron. No Court can fine or imprison which is not a Court of Record; and if Parliament creates a Court with power to fine or imprison, it is a Court of Record: *Gregory's Case*, 6 Rep. 19*b*; *Griesley's Case*, 8 Rep. 38*a*; *Godfrey's Case*, 11 Rep. 42*a*; *Grenville* v. *College of Physicians*, 12 Mod. 386.

(*d*) Elph. & Cl. on Searches, 78; 1 Cruise, Dig. 60.

(*e*) 2 Bl. 465; Statutes Merchant, Statutes Staple, and recognisances in the nature of a Statute Staple, were acknowledgments of debt in writing before officers appointed for that purpose and enrolled of record. See *Underhill* v. *Devereux* (1670), 2 Wms. Saund. 69 f, note (*s*). The Acts under which they existed were repealed by 26 & 27 Vict. c. 125.

(*f*) *New South Wales Commrs.* v. *Palmer*, [1907] A. C. 179.

(*g*) Bankruptcy Act, 1914, s. 151.

(*h*) *Re Churchill* (1888), 39 Ch. D. 174.

(*i*) *Glynn* v. *Thorpe* (1817), 1 B. & Ald. 153. Now in most cases in the Central Office: R. S. C. Ord. LXI. rr. 1, 14.

Judgment debts;

in a Court of Record, of a debt expressed to be due to the Crown, to an officer of the Court, or to the plaintiff in the action, and is conditioned to secure various objects. The remedy on a recognisance of record in the High Court is by an action of debt or by *scire facias* (*k*).

Judgment debts include debts appearing to be due by the judgment of a Court of Record or of an inferior Court. "To constitute a judgment debt the judgment must be not interlocutory but final, for the payment of a specific sum of money, upon which there is nothing left to be done but to compute interest, and the party must also have an actual right to receive the money" (*l*).

interest on.

By statute a judgment debt carries interest at £4 per cent. from the time of entering up judgment until satisfaction, and such interest may be levied under a writ of execution on such judgment (*m*). Judgments of County Courts do not, but judgments of inferior Courts in existence at the passing of this statute do, carry interest (*n*).

When judgment has been recovered for money due on a covenant, interest is generally payable at the rate of £4 per cent., and not at the rate which may be provided by the covenant, as the covenant is merged in the judgment (*o*).

Priority of judgment creditors.

A judgment creditor is entitled, on the death of the judgment debtor, to be paid out of his estate in priority

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(*k*) Leake on Contracts, Pt. I. Chap. III. A *scire facias* is a judicial writ founded upon some record, and requires the person against whom it is issued to show cause why the party bringing it should not have advantage of such record, or why the record should not be annulled and vacated. It is considered in law as an action, and, though the writ of *scire facias* is not mentioned in the Judicature Act, it can still be issued: *Portal* v. *Emmens* (1876), 1 C. P. D. 201, 664; *Kipling* v. *Todd* (1878), 3 *id.* 350.

(*l*) Per Kindersley, V.-C., *Garner* v. *Briggs* (1858), 27 L. J. Ch. 483, 485. See a discussion as to what are judgments, Elph. & Cl. Searches, 24.

(*m*) 1 & 2 Vict. c. 110, s. 17. See *Borthwick* v. *Elderslie Co.* (No. 2), [1905] 2 K. B. 516; *Ashover Mines, Lim.* v. *Jackson*, [1911] 2 Ch. 355.

(*n*) *Reg.* v. *Essex County Court* (1887), 18 Q. B. D. 704.

(*o*) *Ex p. Fewings* (1884), 25 Ch. D. 338; *Economic Soc.* v. *Usborne*, [1902] A. C. 147.

to specialty and simple contract creditors (*p*). But where the estate of the deceased debtor is insolvent, it may at the instance of a creditor be administered in bankruptcy (*q*), in which case the judgment creditor loses his priority (*r*).

Warrant of attorney.

Sometimes it is wished to place a creditor in the same position as if he had recovered judgment, so as to entitle him to sue out execution (*s*) at any moment. In order to effect this the debtor gives to the creditor an authority, called a warrant of attorney, to enter up judgment in an action to be brought by the creditor against the debtor for an amount specified in the warrant, and a defeasance stating the events upon which and the amount for which execution is to be issued on the judgment, and how the moneys levied are to be applied.

The warrant is void unless the following conditions are satisfied :—(i) It must be attested by a solicitor of the Supreme Court "on behalf of the person giving the warrant, expressly named by him, and attending at his request to inform him of the nature and effect of the warrant before it is executed." The solicitor must in the attestation describe himself as solicitor for the person executing the same, and state that he executes as such attorney (*t*). (ii) The warrant or a true copy of it must be filed in the Bills of Sale Department of the Central Office within twenty-one days after execution (*u*). (iii) The defeasance, if any, must be written on the same paper or parchment as the warrant, before filing (*u*).

Specialty debts.

A specialty debt is a debt created by deed.

(*p*) *Berrington* v. *Evans* (1839), 3 Y. & C. 384; 51 R. R. 395; *Fuller* v. *Redman* (1859), 26 Beav. 600.

(*q*) Bankruptcy Act, 1914, s. 130. See *Re Williams* (1887), 36 Ch. D. 573.

(*r*) Administration of Estates Act, 1925, s. 34 (1), and First Schedule, Part I.

(*s*) See *post*, Chap. XVI.

(*t*) 32 & 33 Vict. c. 62, s. 24.

(*u*) *Ib.* s. 26; Central Office Practice Rules (25).

Simple contract debts.

A simple contract debt is one which does not fall under either of the other classes, and may be due under a parol contract, express or implied, in writing or oral. It includes debts under bills of exchange or promissory notes.

Former and present advantages of specialty creditors.

There was formerly a distinction between the specialty and simple contract creditors of a deceased person as to priority of payment, to the advantage of the former; but this distinction was removed by Hinde Palmer's Act (*x*); but this statute does not affect any lien, charge, or other security that the creditor may have for the payment of his debt. A specialty creditor has still an advantage over a simple contract creditor with regard to the operation of the Statutes of Limitation (*y*). If the heirs of the debtor are bound by the deed (that is, if the debtor covenanted that he or his heirs should pay), the specialty creditor can sue the devisee, or the heir of the debtor, and obtain judgment to the value of the lands taken by devise or descent from the debtor (*z*). By the effect of the Law of Property Act, 1925 (*a*), all covenants made after 1881 bind the heir or devisee so as to enable the covenantee to maintain an action against the heir or devisee personally. Where a person dies insolvent, the same rules now apply as to the respective rights of secured and unsecured creditors, and as to the debts and liabilities provable, as may be in force for the time being under the law of bankruptcy with respect to the estates of bankrupts (*b*).

§ 2. *Guarantees.*

A guarantee is a contract by which one person, called

(*x*) 32 & 33 Vict. c. 46, repealed and re-enacted in substance by A. E. Act, 1925, s. 34 and First Schedule. See *Re Samson*, [1906] 2 Ch. 584; *post*, Chap. XIX.

(*y*) *Post*, Chap. XVIII.

(*z*) 11 Geo. 4 & 1 Will. 4, c. 47, repealed and re-enacted in substance by A. E. Act, 1925, ss. 32, 38. See *Re Hedgely* (1887), 32 Ch. D. 379.

(*a*) S. 80, in substance re-enacting 44 & 45 Vict. c. 41, s. 59.

(*b*) Administration of Estates Act, 1925, s. 34 (1), and Part I. of Schedule I. to the Act. As to the rules in question, see *post*, Chap. XVII.

the surety, makes himself collaterally liable for the debt of, or the performance of a contract by, another person, called the principal.

Where consideration given once for all.

Guarantees may be divided into two classes (*c*):—

(1) Where the consideration is entire; in which case the guarantee necessarily remains in force during the whole time for which it was originally given; as, for example, where, in consideration of A. granting a lease to B., C. guarantees the performance of the covenants by B. In this case, as soon as the lease is granted, there is nothing more for A. to do, and the guarantee necessarily lasts during the whole term of the lease (*d*).

Where consideration supplied from time to time.

(2) Where the consideration is supplied from time to time. In this case, unless the contrary appears in the agreement, the guarantor may at any time terminate the liability as to matters subsequent to such determination. An example is where a guarantee is given to secure an account current at a banker's, or a balance of running account for goods delivered (*e*).

Co-sureties.

Where several persons with the privity of each other become sureties for the same debt or contract, whether they become bound by the same or different instruments (*f*), they are co-sureties. On the other hand, it is possible for persons to become sureties for the same principal without becoming co-sureties; as, for instance, where each by a separate contract becomes surety for part of his principal's debt; or where one becomes surety only in default of payment by the principal and the other surety (*g*).

(*c*) *Lloyds* v. *Harper* (1881), 16 Ch. D. 290.

(*d*) *Re Crace*, [1902] 1 Ch. 733, and cases there cited.

(*e*) *Re Crace*, *sup.*

(*f*) *Mayhew* v. *Crickett* (1818), 2 Swanst. 185; 19 R. R. 57.

(*g*) *Coope* v. *Twynam* (1823), T. & R. 426; 24 R. R. 89; *Craythorne* v. *Swinburne* (1807), 14 Ves. 160; 9 R. R. 264; *Re Denton*, [1904] 2 Ch. 178.

Contribution.

A co-surety who pays more than his own proportion of the principal's debt can obtain contribution from his co-surety (*h*).

Securities.

All the co-sureties are entitled to the benefit of any security which any one of them has obtained from the principal debtor (*i*).

Statute of Frauds—guarantee must be in writing.

It is provided by the Statute of Frauds (*k*) that—

> "No action shall be brought to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized."

The promise must be made to the person to whom the principal debtor is liable, so that a promise to A. to pay B. a debt due from A. to B. is not within the statute (*l*). It must be a promise to answer for the debt, &c., of another for which that other remains liable (*m*); and there must be an absence of any liability on the part of the defendant or his property except such as arises from his special promise (*n*). An agreement to give a guarantee is within the statute (*o*).

Consideration for guarantee need not appear in writing.

The word "agreement" includes the consideration as well as the promise, and therefore this statute was held not to be satisfied unless the consideration was stated (*p*). But in this respect the law was altered by the Mercantile Law Amendment Act, 1856 (*q*), which

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(*h*) *Pendlebury* v. *Walker* (1841), 4 Y. & C. 424; 54 R. R. 499; *Ex p. Snowdon* (1881), 17 Ch. D. 44; *Re Ennis*, [1893] 3 Ch. 242; *Ellesmere Co.* v. *Cooper*, [1896] 1 Q. B. 75; *Stirling* v. *Burdett*, [1911] 2 Ch. 418.

(*i*) *Steel* v. *Dixon* (1881), 17 Ch. D. 825; *Berridge* v. *Berridge* (1890), 44 Ch. D. 168.

(*k*) 29 Car. 2, c. 3, s. 4 (2).

(*l*) *Eastwood* v. *Kenyon* (1840), 11 A. & E. 438; 52 R. R. 400.

(*m*) *Birkmyr* v. *Darnell* (1704), 1 Sm. L. C. (ed. 13), 331, and notes; *Re Hoyle*, [1893] 1 Ch. 84; *Guild* v. *Conrad*, [1894] 2 Q. B. 885; *Davys* v. *Buswell*, [1913] 2 K. B. 47.

(*n*) *Sutton* v. *Grey*, [1894] 1 Q. B. 285; *Harburg Co.* v. *Martin*, [1902] 1 K. B. 778.

(*o*) *Mallet* v. *Bateman* (1865), L. R. 1 C. P. 163.

(*p*) *Wain* v. *Warlters*, 1 Sm. L. C. (ed. 13), 358, and notes.

(*q*) 19 & 20 Vict. c. 97, s. 3.

provides that no such promise "shall be deemed invalid to support an action, suit, or other proceeding against the person by whom such promise shall be made by reason only that the consideration for such promise does not appear in writing or by necessary inference from a written document."

The effect of this enactment is to allow parol evidence to be given as to the consideration, but it does not allow such evidence to be given to vary or alter the written contract (*r*).

The Partnership Act, 1890 (*s*), repealing sect. 4 of the Mercantile Law Amendment Act, 1856, provides that—

Continuing guarantee to or in respect of firm.

> "A continuing guaranty given either to a firm, or to a third person in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guaranty was given" (*t*).

Different contracts of suretyship.

A contract of guarantee may be one to which the creditor is a party, or it may be a contract, either express or implied, between the principal and surety only, to which the creditor is a stranger (*u*). In the latter case the persons who, as between themselves, are in the position of sureties are, with regard to the creditor, in the position of principals (*u*).

Duty of creditor to surety.

When the creditor is a party to the guarantee, the concealment from the surety with the knowledge of the creditor of any material part of his contract with the debtor or any material circumstances which might affect the responsibility of the surety, will avoid the guarantee (*x*); but in the case of guarantees other than

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(*r*) *Holmes* v. *Mitchell* (1859), 7 C. B. (N.S.) 361. See notes to *Birkmyr* v. *Darnell* (1704), 1 Sm. L. C. 336.

(*s*) 53 & 54 Vict. c. 39, s. 18.

(*t*) As to the old law, see *Spiers* v. *Houston* (1829), 4 Bli. (N.S.) 515; *Cambridge University* v. *Baldwin* (1842), 5 M. & W. 580; 52 R. R. 850.

(*u*) *Duncan* v. *N. & S. Wales Bank* (1881), 6 App. Cas. 11, *per* Selborne, L.C.; *Nicholas* v. *Ridley*, [1904] 1 Ch. 192.

(*x*) *Pidcock* v. *Bishop* (1825), 3 B. & C. 605; 27 R. R. 430; *Lee* v. *Jones* (1864), 17 C. B. (N.S.) 482; *L. G. O. Co.* v. *Holloway*, [1912] 2 K. B. 72.

fidelity guarantees it would appear that there must be something which amounts to fraud (*y*).

Discharge of surety by material alteration;

If a written guarantee is altered in any material particular after it has been signed by a surety, that surety is discharged (*z*).

release of debtor, or giving time;

If the creditor releases the principal, or gives him time, without expressly reserving all rights against the surety, the surety is discharged (*a*); but not when time is given after judgment has been already obtained against both the principal debtor and the surety (*b*); and not if the principal debtor is released or discharged by operation of law (*c*). Also, if the contract between the creditor and the debtor is varied so as to alter the position of the surety (*d*); or if the creditor gives up or negligently loses any security to the benefit of which the surety would be entitled (*e*); or if the creditor releases a co-surety, unless there is no right to contribution (*f*).

loss of securities.

Surety's right to securities of creditor.

A creditor, who has been paid by a surety, is bound to give to the surety the benefit of every security which he has received either at the time when the guarantee was given (*g*), or subsequently (*h*), whether the surety knew of their existence or not.

(*y*) *North British Assur. Co.* v. *Lloyd* (1854), 10 Ex. 523; *National Provincial Bank* v. *Glanusk*, [1913] 3 K. B. 335.

(*z*) *Davidson* v. *Cooper* (1843), 11 M. & W. 778; 13 *id.* 343; *Ellesmere Co.* v. *Cooper*, [1896] 1 Q. B. 75.

(*a*) *Bateson* v. *Gosling* (1872), L. R. 7 C. P. 13; *Oriental Corp.* v. *Overend* (1872), 7 Ch. 142, 150; *Commercial Bank of Tasmania* v. *Jones*, [1893] A. C. 313; *Rees* v. *Berrington* (1795), 2 W. & T. L. C. (ed. 9), 521; *Perry* v. *N. P. Bank*, [1910] 1 Ch. 464.

(*b*) *Re A Debtor* (*No.* 14 *of* 1913), [1913] 3 K. B. 11.

(*c*) *Re FitzGeorge*, [1905] 1 K. B. 462. See *Re Moss*, [1905] 2 K. B. 307.

(*d*) *Polak* v. *Everett* (1876), 1 Q. B. D. 669; *Holme* v. *Brunskill* (1878), 3 Q. B. D. 495; *Bolton* v. *Buckenham*, [1891] 1 Q. B. 278; *Smith* v. *Wood*, [1929] 1 Ch. 14.

(*e*) *Bolton* v. *Salmon*, [1891] 2 Ch. 48; *Rainbow* v. *Juggins* (1880), 5 Q. B. D. 138, 422; *Smith* v. *Wood*, *sup.*

(*f*) *Ward* v. *Nat. Bank of N. Z.* (1883), 8 App. Cas. 764; *Mercantile Bank* v. *Taylor*, [1893] A. C. 317.

(*g*) *Dering* v. *Winchelsea*, 2 W. & T. L. C. (ed. 9), 488; *Dixon* v. *Steel*, [1901] 2 Ch. 602.

(*h*) *Lake* v. *Brutton* (1856), 8 De G. M. & G. 441; *Forbes* v. *Jackson* (1882), 19 Ch. D. 615.

The Mercantile Law Amendment Act, 1856, provides (*i*) :—

> "Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and if need be, and upon a proper indemnity, to use the name of the creditor in any action or other proceeding at law or in equity in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: Provided always that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable" (*k*).

A co-surety who has paid the creditor and taken an assignment of the securities is entitled, under this section, to sue his co-surety for the full amount of the debt, but he can actually recover only the amount which the co-surety is justly bound to contribute (*l*).

Right to indemnity from principal.

A surety has a right to be indemnified by his principal, and can recover from his principal all that he has been under a reasonable obligation and necessity to pay (*m*).

Right of surety to compel debtor to pay.

The surety, generally speaking, has an equitable right to take proceedings to compel the principal debtor to pay the debt when due, whether the surety has been

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(*i*) 19 & 20 Vict. c. 97, s. 5.
(*k*) See *Lightbown* v. *M'Myn* (1886), 33 Ch. D. 575.
(*l*) *Re Parker*, [1894] 3 Ch. 400.
(*m*) *Rodgers* v. *Maw* (1846), 15 M. & W. 444.

sued or not (*n*); and the surety may sometimes compel the creditor to proceed against the debtor (*n*).

Where each debtor is principal.

In guarantees of the class where, so far as the creditor is concerned, each debtor is a principal debtor, and the contract of suretyship exists between the debtors only, the creditor does not lose his remedies against one of the debtors by his course of dealing with the other of them (*o*). But it is quite consistent with this, that, where one debtor is in fact a surety for the other, the creditor is not to be at liberty, after he has received notice of this fact, to do anything which prejudices the right of one debtor against the other, or to refuse, after he has received all that is due to him, to give effect to the rights of one debtor against the other (*p*).

Creditor not entitled to securities of surety.

It has been held that a creditor is not entitled to the benefit of securities which have been given by the principal debtor to the surety (*q*).

(*n*) *Ascherson* v. *Tredegar Dry Dock Co.*, [1909] 2 Ch. 401, where the earlier cases are all considered. Cf. *Morrison* v. *Barking Chemicals Co.*, [1919] 2 Ch. 325. See notes to *King* v. *Baldwin*, 2 Hare & Wallace, American Leading Cases, 412 *et seq.*

(*o*) *Ward* v. *National Bank of New Zealand* (1883), 8 App. Cas. 755.

(*p*) *Duncan* v. *N. & S. Wales Bank* (1881), 6 App. Cas. 12; *Overend* v. *Oriental Corp.* (1874), L. R. 7 H. L. 348; *Rouse* v. *Bradford Bank*, [1894] A. C. 586.

(*q*) *Re Walker*, [1892] 1 Ch. 621, Stirling, J.

CHAPTER X.

NEGOTIABLE INSTRUMENTS.

§ 1. *In General.*

Negotiable instrument described.

A NEGOTIABLE instrument is a document embodying a contract to pay money to a person named, or his order (which is signified by an indorsement on the instrument), or to the bearer of the document (*a*), and possessing certain peculiar qualities which will be best understood by considering such instruments as being exceptions to the operation of two general rules of English law, viz., the rules (1) that no man can transfer a better title to a chattel personal than he himself possesses, except only by a sale in market overt; and (2) that a *chose in action* cannot, at common law, be assigned so as to give the assignee a right to sue on the contract in his own name.

Qualities.

As to the first rule :—

> "The general rule of law is undoubted, that no one can transfer a better title that he himself possesses: *Nemo dat quod non habet.* To this there are some exceptions; one of which arises out of the rule of the law merchant as to negotiable instruments. These, being part of the currency, are subject to the same rule as money: and if such an instrument be transferred in good faith, for value, before it is overdue, it becomes available in the hands of the holder, notwithstanding fraud which would have rendered it unavailable in the hands of a previous holder" (*b*).

Negotiable instrument represents money.

An instrument entitling the holder to a sum of money is treated as the representative of money, and as subject to the same rules as the money which it represents; and it has been long settled that the right to money is

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(*a*) See *Partridge* v. *Bank of England* (1846), 9 Q. B. 396, 406, 424; as to bills of exchange, see Act of 1882 (45 & 46 Vict. c. 61), s. 8 (4).

(*b*) Per Willes, J., *Whistler* v. *Forster* (1863), 14 C. B. (N.S.) 257—8; *London Joint Stock Bank* v. *Simmons*, [1892] A. C. 201.

inseparable from the possession of it (*c*); "the property in current coin passes by delivery of it, and the actual possessor of the coin, even if he has stolen it, can by delivery confer a good title upon another who receives it honestly" (*d*). The decisions as to the negotiability of certain instruments "proceed upon the nature of the property, viz., money, to which such instruments give the right, and which is itself current; and the effect of the instruments, which either give to their holders, merely as such, the right to receive the money, or specify them as the persons entitled to receive it" (*e*).

"In the case of goods, the property, except in market overt, can only be transferred by the owner, or some person having either an express or implied authority from him; and no one can, by his contract or delivery, transfer more than his own right, or the right of him under whose authority he acts. But the Courts have considered these instruments—either promises or orders for the payment of money, or instruments entitling the holder to a sum of money—as being appendages to money and following in the nature of their principal" (*f*).

"The holder *bona fide* and for a valuable consideration of a bank note or bill of exchange has a good title against all the world; because in the case of bank notes they are considered as money and pass as such, and it is essential for the purposes of trade that delivery should give a perfect title; and because, in the case of bills of exchange, this is the law and custom of merchants" (*g*).

Negotiability—how created.

The quality of negotiability must be derived either from the law merchant—the recognised custom of merchants—or from some statute of the realm (*h*). A negotiable instrument may be made payable to order of a named person, or to the bearer (*i*).

Negotiable instrument defined.

"A negotiable instrument payable to bearer is one which, by the custom of trade, passes from hand to hand by delivery,

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(*c*) Per Best, J., *Wookey* v. *Pole* (1820), 4 B. & Ald. 6; 22 R. R. 594.

(*d*) Campbell on Sale, 2nd ed., p. 86; see per Lord Mansfield, in *Miller* v. *Race*, 1 Burr. 452; 1 Sm. L. C. (ed. 13), 524.

(*e*) Per Holroyd, J., *Wookey* v. *Pole, supra.*

(*f*) Per Holroyd, J., *id.* p. 10.

(*g*) Per Bayley, J., *id.* p. 15.

(*h*) Per Bowen, L.J., *Picker* v. *London Bank* (1887), 18 Q. B. D. 519.

(*i*) See *post*, p. 196.

and the holder of which for the time being, if he is a *bona fide* holder for value without notice, has a good title notwithstanding any defect of title in the person from whom he took it. A contractual document, in other words, may be such that, by virtue of its delivery, all the rights of the transferor are transferred to and can be enforced by the transferee against the original contracting party, but it may yet fall short of being a completely negotiable instrument, because the transferee acquires by mere delivery no better title than his transferor" (*k*).

Test of negotiability.

Negotiable instruments therefore form an exception to the rule "*Nemo dat quod non habet*": and it is the capability of conferring on a *bona fide* holder for value a better title than that of his transferor which would appear to be the real test of negotiability. They also possess the characteristic that the transferee can (and could before the Judicature Act) maintain an action at law upon them in his own name. These two characteristics are distinct (*l*), and an instrument is not negotiable unless it possesses them both.

"It may be laid down as a safe rule that, where an instrument is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it *pro tempore*, there it is entitled to the name of a *negotiable* instrument, and the property in it passes to a *bona fide* transferee for value, though the transfer may not have taken place in market overt. But that if either of the above requisites be wanting, *i.e.*, if it be either not accustomably transferable, or, though it be accustomably transferable, yet if its nature be such as to render it incapable of being put in suit by the party holding it *pro tempore*, it is not a negotiable instrument, nor (apart from the question of estoppel) will delivery of it pass the property of it to a vendee, however *bona fide*, if the transferor himself have not a good title to it and the transfer be made out of market overt" (*m*).

Therefore (for example) though a bill of lading can be transferred so as to give the transferee a right to sue at law in his own name (*n*), it is not "negotiable,"

(*k*) *Simmons* v. *London Joint Stock Bank*, [1891] 1 Ch. 270, 294.

(*l*) *Crouch* v. *Crédit Foncier* (1873), L. R. 8 Q. B. 381.

(*m*) Note to *Miller* v. *Race* (1758), in 1 Sm. L. C. (ed. 13), 533; cited per Blackburn, J., in *Crouch* v. *Crédit Foncier*, *sup.*; per Manisty, J., *London and County Bank* v. *London and River Plate Bank* (1888), 20 Q. B. D. 239; *Jones* v. *Coventry*, [1909] 2 K. B. 1029.

(*n*) 18 & 19 Vict. c. 111. *Ante*, p. 88.

because the transferee acquires no better title than his transferor had (*o*); and the same is true of policies of assurance (*p*) and of other instruments made transferable at law by statute.

Bona fide holder.

By a "*bona fide* holder" is meant a person who takes the instrument for value and honestly without notice or knowledge of any defect in the title of the transferor (*q*); and "notice or knowledge" means "not merely express notice, but knowledge, or the means of knowledge, to which the party wilfully shuts his eyes—a suspicion in the mind of the party, and the means of knowledge in his power wilfully disregarded" (*r*). It was formerly held that mere negligence or want of due caution in a party taking a negotiable instrument would fix him with the defective title of the party passing it to him (*s*), but this doctrine is now rejected, and it is settled law that even gross negligence is not a sufficient defence where the plaintiff has given consideration, though it may be evidence of dishonesty or *mala fides* (*t*). Wilful and fraudulent abstention from inquiry, if it arise from a suspicion or belief that inquiry would disclose a defect of title, may amount to notice (*u*); but it is not enough to show that there was carelessness, negligence, or foolishness, in not suspecting the defect of title (*x*).

By custom.

Modern usage.

In order to be negotiable by custom, an instrument must be accustomably transferable in this country, like cash, by delivery (*y*). In the case of English

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(*o*) *Gurney* v. *Behrend* (1854), 3 E. & B. 622; see notes to *Lickbarrow* v. *Mason* (1794), 1 Sm. L. C. (ed. 13), 766.

(*p*) 30 & 31 Vict. c. 144; *British Equitable Insur.* v. *G. W. Ry. Co.* (1869), 38 L. J. Ch. 132.

(*q*) See *post*, p. 217.

(*r*) Per Willes, J., *Raphael* v. *Bank of England* (1855), 17 C. B. 161, 174.

(*s*) *Gill* v. *Cubitt* (1824), 3 B. & C. 466.

(*t*) *Raphael* v. *Bank of England*, *sup.* See *London Joint Stock Bank* v. *Simmons*, [1892] A. C. 201.

(*u*) *Jones* v. *Gordon* (1877), 2 App. Cas. 616, 625.

(*x*) *Id.* 628, *per* Lord Blackburn. See *Tatam* v. *Haslar* (1889), 23 Q. B. D. 345; and the notes to *Miller* v. *Race*, in 1 Sm. L. C. (ed. 13), 540 *et seq.*, where the cases are discussed.

(*y*) *Crouch* v. *Crédit Foncier*, *sup.*

instruments, it has been held that they cannot become negotiable by usage except by the ancient law merchant, and that *modern* usage cannot make an instrument negotiable (*y*). But this view has not been followed in later cases and may be taken to be overruled (*z*); it has now been decided that debenture bonds payable to bearer have by modern usage become negotiable instruments (*a*).

Foreign instruments.

With regard to foreign instruments, it must be shown that they are, by the custom of merchants, negotiable in this country (*b*), and it is not sufficient to show that they are negotiable in the foreign country (*c*). Probably they must be negotiable in the foreign country also, but this can be inferred from the fact that they are negotiable in this country (*c*).

Instruments on their face not negotiable.

If it appears upon the face of an instrument that the right to recover thereon is limited to one particular individual, or that it is not to be transferable by delivery, usage or custom cannot make it negotiable (*d*).

Negotiability by estoppel.

A debtor may contract in such a way as to prevent himself from setting up equities against the holder of an instrument. Under the doctrine of "negotiability by estoppel," it has been held that the true owner may, by his own conduct and having regard to the nature of the instrument in question, be precluded from asserting his title as against a *bona fide* holder for value. Thus where the plaintiff, the owner of a document containing a representation that the bearer of it would be entitled

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(*y*) *Crouch* v. *Crédit Foncier*, *sup.*

(*z*) *Goodwin* v. *Robarts* (1876), 1 App. Cas. 476; *Rumball* v. *Metrop. Bank* (1877), 2 Q. B. D. 194.

(*a*) *Bechuanaland Co.* v. *London Trading Bank*, [1898] 2 Q. B. 658; *Edelstein* v. *Schuler*, [1902] 2 K. B. 144.

(*b*) *Gorgier* v. *Mieville* (1824), 3 B. & C. 45; 27 R. R. 290; *Goodwin* v. *Robarts*, *sup.*; *Crouch* v. *Crédit Foncier*, *sup.*; *Venables* v. *Baring*, [1892] 3 Ch. 527.

(*c*) *Picker* v. *London Bank* (1887), 18 Q. B. D. 515.

(*d*) *Partridge* v. *Bank of England* (1846), 9 Q. B. 396, 425; *London and County Bank* v. *London and River Plate Bank* (1888), 20 Q. B. D. 232; 21 *id.* 535; *Colonial Bank* v. *Cady* (1890), 15 App. Cas. 267. As to bills, cheques and notes, see s. 8 of Bills of Exchange Act, 1882.

to receive a bond, left the document in the hands of his broker, who fraudulently deposited it with the defendants, it was held that the plaintiff could not recover, on the ground that the document was a representation to anyone taking it—a representation which the plaintiff must be taken to have made, or to have been a party to—that, if it were taken in good faith and for value, the person taking it would stand to all intents and purposes in the place of the previous holder; and the plaintiff had put it in the power of his agent to hand over the document with this representation to those who were induced to alter their position on the faith of the representation so made (*e*). The expression is somewhat misleading. The doctrine depends on an estoppel raised against the true owner by his own conduct, and the effect is to make the instrument *quasi* negotiable *as against him*, but not to make it negotiable in the strict sense. If (for example), without any default on the part of the owner of such an instrument, it were stolen from him, no title could, it is apprehended, be made through the thief (*f*).

§ 2. *Bills of Exchange.*

Bills of exchange are negotiable.

The law as to bills of exchange, promissory notes, and cheques, is contained in the Bills of Exchange Act, 1882 (*g*), which embodies the pre-existing law with but slight modifications (*h*). Prior to the passing of the Act, bills of exchange were negotiable by the law

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(*e*) *Goodwin* v. *Robarts*, *sup.* See *Rumball* v. *Metrop. Bank*, *sup.*; *France* v. *Clark* (1884), 26 Ch. D. 257; *Bentinck* v. *London Joint Stock Bank*, [1893] 2 Ch. 120; *Lloyds Bank* v. *Cooke*, [1907] 1 K. B. 794; *Smith* v. *Prosser*, [1907] 2 K. B. 735. Cf. *London Joint Stock Bank* v. *Macmillan*, [1918] A. C. 777, approving *Young* v. *Grote* (1827), 4 Bing. 253.

(*f*) See *Colonial Bank* v. *Cady*, *sup.*; *Colonial Bank* v. *Hepworth* (1887), 36 Ch. D. 36; *Baxendale* v. *Bennett* (1878), 3 Q. B. D. 525; *Scholfield* v. *Londesborough*, [1896] A. C. 514.

(*g*) 45 & 46 Vict. c. 61.

(*h*) As to the origin and history of bills of exchange and other negotiable instruments, see per Cockburn, C.J., *Goodwin* v. *Robarts*, *sup.* As to the modifications introduced by the Act of 1882, see Chalmers on Bills of Exchange, 2.

merchant (*i*); promissory notes by statute (*k*); cheques on bankers, which are bills of exchange payable on demand (*l*), by the law merchant.

Effect of assignment by separate instrument.

It must, however, be remembered that a negotiable instrument is a *chose in action*, and that therefore it can be transferred (formerly in equity only) under the general law (*m*). The question therefore arises—What is the effect of a transfer for value of a bill of exchange made in the manner generally adopted for the transfer of choses in action, *i.e.*, by assignment to A. (without delivery of the bill) by a separate instrument, of which assignment notice is given to the debtor, followed by a transfer for value, made according to the law applicable to negotiable instruments, to another transferee, B., who had no notice of the prior transfer? In such a case, if the transaction took place before the Judicature Act, 1873, the transfer to A. operated in equity only, and therefore the legal title of B. necessarily prevailed. If the transaction took place after the Act, so that the first transferee could obtain a legal title, still, if he neglected to obtain delivery and to keep possession of the instrument, and thus by his laches enabled the second transfer to be made, he would probably be postponed for this reason to the second transferee (*n*).

Before we proceed to discuss the law as to bills of exchange, it will be convenient to state the meaning of the terms employed.

Form of bill of exchange.

A bill of exchange may be in the form following :—

LONDON, 1st July, 1925.
£10,000.
Two months after date pay to Mr. John Jones or order Ten Thousand Pounds for value received.
To Mr. ROBERT ROBINSON, BENJAMIN BROWN.
Merchant, Liverpool.

Benjamin Brown is called the drawer; Robert Robinson

(*i*) *Goodwin* v. *Robarts*, *sup.* (*k*) *Post*, p. 228.

(*l*) *Grant* v. *Vaughan* (1764), 3 Burr. 1516. See 45 & 46 Vict. c. 61, s. 73.

(*m*) *Re Barrington* (1804), 2 Sch. & Lef. 112; 9 R. R. 61; *Richardson* v. *Richardson* (1867), 3 Eq. 686.

(*n*) See Chalmers on Bills of Exchange (ed. 8), 150.

the drawee, and, if he "accepts," he is called the "acceptor"; John Jones the "payee," and, if he indorses, *i.e.*, writes his name on the back of the bill, he is called the "indorser"; while the person to whom it is delivered (after indorsement) is called the "holder."

Funds in hands of drawee.

A bill, of itself, is not an assignment of funds in the hands of the drawee available for payment of it, and a drawee who does not duly accept is not liable on the bill (*o*).

Liabilities of acceptor, of drawer,

The acceptor of a bill, by accepting it, engages that he will pay it according to the tenor of his acceptance (*p*). The drawer of a bill, by drawing it, engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or *any* indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken (*q*); and the indorser, by indorsing, enters into the same engagement with the holder or a *subsequent* indorser (*r*).

of indorser,

of transferor without indorsement.

A holder of a bill payable to bearer who negotiates by delivery without indorsement is not liable on the instrument; but he warrants to his transferee for value that the bill is what it purports to be, that he has a right to transfer it, and that he is not then aware of any fact which renders it valueless (*s*).

Relation of parties.

But the whole facts and circumstances attendant upon the making, issue, and transference of a bill or note may be referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it, either as makers or as indorsers; and reasonable inferences derived from these facts and circumstances are admitted to qualify, alter, or even

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(*o*) Bills of Exchange Act, 1882, s. 53. See *post*, p. 231.

(*p*) S. 54 (1). *Smith* v. *Vertue* (1860), 9 C. B. (N.S.) 224, per Erle, C.J.

(*q*) S. 55 (1). *Siggers* v. *Lewis* (1834), 1 C. M. & R. 370; 40 R. R. 608; *Jones* v. *Broadhurst* (1850), 9 C. B. 181, per Cresswell, J. See *The Elmville*, [1904] P. 319.

(*r*) S. 55 (2). *Suse* v. *Pompe* (1860), 8 C. B. (N.S.) 538. As to dishonour, see *post*, p. 204.

(*s*) S. 58.

invert the relative liabilities which the law merchant would otherwise assign to them (*t*).

Persons signing bill.

A person who signs the bill otherwise than as drawer or acceptor incurs no liability to the drawer or acceptor, but he incurs the liability of an indorser to a holder in due course (*u*).

Various definitions have been given of bills of exchange.

Definition.

Blackstone says (*x*) :—

> "A bill of exchange is a security, originally invented among merchants in different countries, for the more easy remittance of money from one to the other, which has since spread itself into almost all pecuniary transactions. It is an open letter of request from one man to another, desiring him to pay a sum named therein to a third person on his account; by which means a man at the most distant part of the world may have money remitted to him from any trading country. If A. lives in Jamaica, and owes B., who lives in England, £1,000, now if C. be going from England to Jamaica, he may pay B. this £1,000, and take a bill of exchange drawn by B. in England upon A. in Jamaica, and receive it when he comes thither. Thus does B. receive his debt, at any distance of place, by transferring it to C.; who carries over his money in paper credit, without danger of robbery or loss. This method is said to have been brought into general use by the Jews and Lombards, when banished for their usury and other vices, in order more easily to draw their effects out of France and England, into those countries in which they had chosen to reside. The invention of them was a little earlier: for the Jews were banished out of Guienne in 1287, and out of England in 1290; and in 1236 the use of paper credit was introduced into the Mogul Empire in China."

Definition in Act.

The Act of 1882 contains the following definition of a bill of exchange :—

> S. 3. "(1.) A bill of exchange is an unconditional (*y*) order in writing, addressed by one person to another,

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(*t*) Per Lord Watson, in *Macdonald* v. *Whitfield* (1883), 8 App. Cas. 745. See *Jenkins* v. *Coomber*, [1898] 2 Q. B. 168; *Shaw & Co.* v. *Holland*, [1913] 2 K. B. 15; *McDonald & Co.* v. *Nash & Co.*, [1924] A. C. 625.

(*u*) Bills of Exchange Act, 1882, s. 56. See *Steele* v. *M'Kinlay* (1880), 5 App. Cas. 754; *Glenie* v. *Smith*, [1908] 1 K. B. 263; *Re Gooch*, [1921] 2 K. B. 593. Also cases cited in preceding note (*t*).

(*x*) 2 Bl. 466.

(*y*) See *Little* v. *Slackford* (1828), M. & M. 171; 31 R. R. 726; *Hamilton* v. *Spottiswoode* (1849), 4 Ex. 200; *Thairlwall* v. *G. N. R. Co.*, [1910] 2 K. B. 509; *Roberts & Co.* v. *Marsh*, [1915] 1 K. B. 42.

signed (*z*) by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person, or to bearer.

"(2.) An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.

"(3.) An order to pay out of a particular fund is not unconditional within the meaning of this section (*a*); but an unqualified order to pay, coupled with an indication of a particular fund (*b*) out of which the drawee is to reimburse himself or a particular account to be debited with the amount, or a statement of the transaction which gives rise to the bill, is unconditional.

"(4.) A bill is not invalid by reason

(a) That it is not dated;

(b) That is does not specify the value given; or that any value has been given therefor (*c*);

(c) That it does not specify the place where it is drawn or the place where it is payable" (*d*).

Inland and foreign bills.

Bills of exchange are either "inland" or "foreign." An inland bill is, or on the face of it purports to be (*e*),—

(1.) Both drawn and payable in the British Islands, or

(2.) Drawn within the British Islands upon some person resident therein.

Any other bill is a foreign bill.

An inland bill is in the form before given (*f*); a foreign bill is generally in the form following:—

Foreign bill.

London, 1st July, 1925.

For francs 1000.

At sixty days after sight of this first of exchange (second and third unpaid) pay to the order of Messrs. Ambler & Co. one thousand francs.

Value received.

Hare, Rollet & Co.

To Messrs. Faber, Paris.

(*z*) See ss. 18 and 20.

(*a*) *Jenny* v. *Herle* (1723), 2 Ld. Raym. 1361.

(*b*) *Re Boyse* (1886), 33 Ch. D. 612.

(*c*) *Hatch* v. *Trayes* (1840), 11 A. & E. 702. Even if the bill contains a statement that value was given, the immediate parties may give evidence that it was not; *Abbott* v. *Hendricks* (1840), 1 M. & Gr. 791; 56 R. R. 542.

(*d*) If no place of payment is specified the place of payment must be ascertained according to the rules laid down by s. 45 (4).

(*e*) Act of 1882, s. 4.

(*f*) *Ante*, p. 193.

If the bill had been drawn on a person in the British Isles, the amount would have been made payable in English money.

When payable.

A bill may be payable on demand, or at a fixed or determinable future time (*g*). A bill is payable on demand which is expressed to be payable on demand, or at sight, or on presentation, or in which no time for payment is expressed (*h*). It is payable at a determinable future time if it is expressed to be payable at a fixed period after date or sight, or on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain (*i*). An instrument payable on a contingency is not a bill (*k*), but it may create a contingent debt, assignable in equity.

"Usance."

Foreign bills are sometimes drawn payable at one or more "usances," where by "usance" is meant time for payment as fixed by custom, having regard to the places where the bill is drawn and where it is made payable.

Days of grace.

Unless a bill is payable on demand, and unless the bill itself otherwise provides, three days, called "days of grace," are added to the time fixed by the bill, and the bill is due and payable on the last day of grace (*l*).

Date.

A bill is not invalid by reason only that it is antedated or post-dated (*m*), or that it bears date on a Sunday (*n*), or by its not bearing any date, in which case the holder may insert the date (*o*).

Payee.

Unless the bill is made payable to bearer, the payee must be named or indicated therein with reasonable certainty (*p*); and formerly, unless the bill was made

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(*g*) S. 3.

(*h*) S. 10.

(*i*) S. 11. See *Colehan* v. *Cooke* (1743), Willes, 399; *Goss* v. *Nelson* (1757), 1 Burr. 226. See s. 14 as to the computation of the time of payment.

(*k*) S. 11. See *Palmer* v. *Pratt* (1824), 2 Bing. 185; 27 R. R. 583; *Carlos* v. *Fancourt* (1794), 5 T. R. 486; 2 R. R. 647.

(*l*) S. 14. See *Schaverien* v. *Morris* (1921), 37 T. L. R. 366.

(*m*) *Royal Bank of Scotland* v. *Tottenham*, [1894] 2 Q. B. 715.

(*n*) S. 13 (2).

(*o*) S. 12. See s. 20.

(*p*) Ss. 3, 7. See *Chamberlain* v. *Young*, [1893] 2 Q. B. 206.

payable to bearer, there could not be an alternative payee, "A. or B." (*q*), nor could a bill be made payable to the officer for the time being of a company (*r*); but now either of these things can be done (*s*).

Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer (*t*); but not where there is a real payee in contemplation although the payee's name is a forgery (*u*).

Referee in case of need.

The drawer or any indorser may insert in a bill the name of "a referee in case of need," that is, a person to whom the holder may resort in case the bill is dishonoured by non-acceptance or non-payment (*x*).

Considera-tion.

It will be remembered that in the case of a contract by deed, that is, under seal, or, as it is termed, a "specialty," valuable consideration is not essential (*y*); this is by reason of its formal character; the solemnity and deliberation with which, on account of the ceremonies to be observed, it is supposed to be entered into. As a general rule a contract not under seal, or "simple contract," creates no right of action unless it is made for valuable consideration. A bill of exchange contains a simple contract for payment, but at common law consideration for the bill is presumed till the contrary appears.

By the Act of 1882, "every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value" (*a*). Valuable consideration for a bill is any consideration sufficient to support a simple contract, or an antecedent debt or liability (*b*).

(*q*) *Blanckenhagen* v. *Blundell* (1819), 2 B. & Ald. 417.

(*r*) *Storm* v. *Stirling* (1854), 3 E. & B. 832.

(*s*) S. 7 (2).

(*t*) S. 7 (3); *Bank of England* v. *Vagliano*, [1891] A. C. 107; *Clutton* v. *Attenborough*, [1897] A. C. 90.

(*u*) *Vinden* v. *Hughes*, [1905] 1 K. B. 795; *Macbeth* v. *N. & S. Wales Bank*, [1908] 1 K. B. 13; *Goldman* v. *Cox* (1924), 40 T. L. R. 744.

(*x*) S. 15.

(*y*) 2 Bl. 446. Pollock, Contract, Chap. III.

(*a*) S. 30 (1).

(*b*) S. 27 (1). See *Poirier* v. *Morris* (1853), 2 E. & B. 89; *Royal Bank of Scotland* v. *Tottenham*, [1894] 2 Q. B. 715.

Such debt or liability is sufficient whether the bill is payable on demand or at a future time (*c*).

Acceptance;

The acceptance of a bill is the signification by the drawee (*d*) of his assent to the order of the drawer (*e*). It must be written on the bill, and be signed by the drawee (*f*). The mere signature of the drawee without additional words is sufficient (*g*). It must not express that the drawee will perform his promise by any other means than the payment of the money (*h*).

A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or has been dishonoured for non-acceptance or non-payment (*i*).

"general" or "qualified";

An accceptance may be either "general" or "qualified." A general acceptance assents without qualification to the order of the drawer (*k*). A qualified acceptance in *express* terms varies the effect of the bill as drawn (*l*).

qualified.

An acceptance is qualified which is—

(i) Conditional, that is, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated (*m*);

(ii) Partial, that is, to pay part only of the amount for which the bill is drawn (*n*);

(iii) Local, that is, to pay *only* at a particular specified place (*o*);

(iv) Qualified as to time (*p*);

(*c*) S. 27 (1). See *Currie* v. *Misa* (1875), L. R. 10 Ex. 153; 1 App. Cas. 554.

(*d*) *Ante*, p. 194; see *Davis* v. *Clark* (1844), 6 Q. B. 16. As to acceptance for honour, see *post*, p. 213.

(*e*) S. 17 (1).

(*f*) S. 17 (2a).

(*g*) *Ib.* Formerly, this was not sufficient; see *Hindhaugh* v. *Blakey* (1878), 3 C. P. D. 136; *Steele* v. *M'Kinlay* (1880), 5 App. Cas. 754; 41 & 42 Vict. c. 13, repealed by the Act of 1882.

(*h*) S. 17 (2b). See *Russell* v. *Phillips* (1850), 14 Q. B. 891.

(*i*) S. 18.

(*k*) S. 19. (*l*) S. 19 (2). *Meyer* v. *Decroix*, [1891] A. C. 520.

(*m*) *Ib.* See *Smith* v. *Vertue* (1860), 9 C. B. (N.S.) 214.

(*n*) *Ib.* See *Petit* v. *Benson* (1697), Comb. 452.

(*o*) *Ib.* See *Halstead* v. *Skelton* (1843), 5 Q. B. 86.

(*p*) *Ib.* See *Russell* v. *Phillips* (1850), 14 Q. B. 891.

(v) The acceptance of some drawees, but not of all (*q*).

Delivery.

To give effect to acceptance the bill must be delivered, that is, the possession, actual or constructive, of it must be transferred from one person to another (*r*), and until delivery every contract in it, whether the drawer's, the acceptor's, or an indorser's, is incomplete and revocable; or there must be notification, that is, notice by the drawee to, or according to the directions of, the person entitled to the bill that he has accepted it, and then the acceptance is complete and irrevocable (*r*).

Issue.

"Delivery" means transfer of possession, actual or constructive, from one person to another (*s*). "Issue" means the first delivery of a bill complete in form to a person who takes it as holder (*s*). It is immaterial that the "issue" has been induced by fraud (*t*).

Skeleton bill—inchoate instruments.

The signing and delivery of a blank or skeleton bill is a *prima facie* authority to fill it up for any amount which the stamp will cover (*u*), using the signature for that of the drawer, the acceptor, or an indorser (*u*); and similarly, when a bill is wanting in any material particular, the holder has *prima facie* authority to fill up the omission in any way he thinks fit (*u*). But the completion must be within a reasonable time and in accordance with the authority given (*x*); though, in the hands of a holder in due course, the bill is valid whether it had been so duly completed or not (*y*). The drawer's name, it would seem, may be filled in even after the acceptor's death (*z*).

(*q*) S. 19 (2). (*r*) Ss. 2, 21.

(*s*) *Ib.* As to delivery by post, see *Ex p. Cote* (1873), 9 Ch. 27; *Smith* v. *Mundy* (1860), 3 E. & E. 22.

(*t*) *Clutton* v. *Attenborough*, [1897] A. C. 90. As to issue on delivery by a thief, see *Baxendale* v. *Bennett* (1878), 3 Q. B. D. 531; *Ingham* v. *Primrose* (1859), 7 C. B. (N.S.) 82; *Arnold* v. *Cheque Bank* (1876), 1 C. P. D. 578.

(*u*) Act of 1882, s. 20 (1). *Glenie* v. *Smith*, [1908] 1 K. B. 263; *Re Gooch*, [1921] 2 K. B. 593; *McDonald & Co.* v. *Nash & Co.*, [1924] A. C. 625; Cf. *Shaw & Co.* v. *Holland*, [1913] 2 K. B. 15.

(*x*) S. 20 (2). *Watkin* v. *Lamb* (1901), 85 L. T. 483.

(*y*) *Ib.* *Herdman* v. *Wheeler*, [1902] 1 K. B. 361.

(*z*) *Carter* v. *White* (1883), 25 Ch. D. 666.

Capacity of parties.

Capacity to incur liability as a party to a bill is co-extensive with capacity to contract (*a*). A corporation cannot make itself liable as a party to a bill unless it is competent so to do under the law relating to corporations (*a*). If a bill is drawn or indorsed by an infant, minor or corporation having no capacity or power to incur liability on a bill, the holder is entitled to receive payment and to enforce the bill against any other party (*b*).

Corporations.

In general a corporation can only contract by writing under its common seal (*c*), and being established for a specific purpose cannot bind itself by a contract which is entirely unconnected with the purposes of its incorporation (*d*). Therefore, it was held that a railway company, incorporated in the usual way by private Act of Parliament, which contained no provision empowering it to draw, accept, or indorse bills of exchange, was not competent to do so, and acceptances given by it with the seal of the company annexed were not binding upon it (*e*). But a corporation may issue bills, where the terms of the instrument under which it is constituted authorise, upon a fair construction, the issuing of bills, or where the business of the corporation is one which cannot in its ordinary course be carried on without bills (*f*), for instance, where it is incorporated for the purpose of trade (*g*). In the case of a company under the Companies Acts, the provisions of which are not affected by the Bills of Exchange Act (*h*), the question will turn upon the proper construction of the memorandum and articles of association (*i*).

A corporation generally signs a bill by procuration, but, in place of signature to any instrument in writing

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(*a*) S. 22 (1).
(*b*) S. 22 (2). *Smith* v. *Johnson* (1858), 3 H. & N. 222.
(*c*) See *Crouch* v. *Crédit Foncier* (1873), L. R. 8 Q. B. 374.
(*d*) *Bateman* v. *Mid-Wales Ry. Co.* (1866), L. R. 1 C. P. 508, per Erle, C.J.
(*e*) *Ib.* p. 499.
(*f*) *Peruvian Co.* v. *Thames, &c. Co.* (1867), 2 Ch. 622.
(*g*) Byles on Bills, 79 *et seq.*
(*h*) S. 97 (3) (*b*).
(*i*) Companies Act, 1929, ss. 29, 30

required by the Act to be signed, the corporate seal may be attached; this does not mean that the bill or note of a corporation must be under seal (*k*). By the Companies Act, 1929 (*l*), with regard to a company incorporated thereunder, and having authority to draw, accept, or indorse a bill of exchange, it is provided that:—

Companies Act, 1929.

> "A bill of exchange or promissory note shall be deemed to have been made, accepted, or indorsed on behalf of a company if made, accepted, or indorsed in the name of, or by or on behalf or on account of, the company by any person acting under its authority."

Where there is power to authorise directors to draw bills, a person taking in due course a bill drawn by a director on behalf of the company is entitled to assume that he had authority (*m*).

Where directors accepted bills on behalf of a company which had no power to accept bills, it was held that they were personally liable to an indorsee for value (*n*).

Signature.

Signature is essential to liability under a bill whether as drawer, indorser, or acceptor (*o*). Where a signature is forged or placed on a bill without authority, it is wholly inoperative, unless the party against whom it is sought to retain or enforce payment of the bill is estopped from setting up the forgery or want of authority (*p*). For instance, where a person sued upon a bill has declared or admitted that the signature is his own, and has thereby altered the position of the holder to whom the declaration or admission has been made, he is estopped from denying his signature (*q*). Where a forged bill has been paid, and the position of the

Forged or unauthorised signature.

Estoppel.

(*k*) Act of 1882, s. 91 (2). Before the Act it was doubtful whether a bill or note issued under the seal of a corporation was negotiable: *Crouch* v. *Crédit Foncier* (1873), L. R. 8 Q. B. 382, 383.

(*l*) S. 30. *Chapman* v. *Smethurst*, [1909] 1 K. B. 927; *Dey* v. *Pullinger Engineering Co.*, [1921] 1 K. B. 77.

(*m*) *Dey* v. *Pullinger Engineering Co.*, *sup.*

(*n*) *West London Bank* v. *Kitson* (1884), 13 Q. B. D. 360.

(*o*) Act of 1882, s. 23.

(*p*) S. 24. Subject to some exceptions contained in ss. 54, 55, 60, and ss. 80 and 82 as amended by 46 & 47 Vict. c. 55, s. 17, and 6 Edw. 7, c. 17. See *Bank of England* v. *Vagliano*, [1891] A. C. 107; *Embiricos* v. *Anglo-Austrian Bank*, [1904] 2 K. B. 870.

(*q*) *London & R. P. Bk.* v. *Liverpool Bk.*, [1896] 1 Q. B. 7.

holder has been altered, the payer cannot recover back the money which he has paid when he subsequently discovers the forgery (*q*). It has been held that there cannot be ratification of an unauthorised signature amounting to a forgery (*r*).

Ratification.

Banker's liability.

Where a drawee accepts a bill "payable at" a banker's, the banker, if he pays on a forged indorsement, cannot charge his customer with the amount so paid (*s*).

But where the banker is himself the drawee, he is protected when the bill is payable to order on demand (*i.e.*, in the ordinary case of cheques drawn on a bank), and he pays it in good faith and in the ordinary course of business; he need not show that the indorsement of the payee, or any subsequent indorsement, was by or under the authority of the person whose indorsement it purports to be; and he is deemed to have paid the bill in due course, although the indorsement have been forged or made without authority (*t*).

Signature by agent.

Signature in the name of the person to be made liable may be made by an agent (*u*). Upon the principle already discussed (*x*), an agent managing a business, part of which consists in drawing, indorsing, or accepting bills, may bind his principal by signing his name to a bill though he be specially instructed not to do so (*y*); and an agent having authority to sign the name of his principal may direct another person to sign that name to a particular bill (*z*).

Sometimes the signature is "by procuration," thus, "Benjamin Brown, *per pro.* Samuel Smith." Such a signature operates as notice that Samuel Smith, as the agent of Benjamin Brown, has but a limited authority

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(*r*) *Brook* v. *Hook* (1871), L. R. 6 Ex. 89, per Kelly, C.B. But see *M'Kenzie* v. *British Linen Co.* (1881), 6 App. Cas. 82.

(*s*) *Robarts* v. *Tucker* (1851), 16 Q. B. 560; Byles on Bills, 252, 298.

(*t*) Act of 1882, s. 60. See *Lacave* v. *Crédit Lyonnais*, [1897] 1 Q. B. 148.

(*u*) S. 91.

(*x*) *Ante*, p. 91.

(*y*) *Edmunds* v. *Bushell* (1865), L. R. 1 Q. B. 97.

(*z*) *Lord* v. *Hall* (1848), 8 C. B. 627.

to sign; and the principal is bound only if the agent was acting within the limits of his authority (*a*). It is not, however, a forgery if an agent having authority to sign cheques for certain purposes does so for purposes in excess of his authority and in fraud of his principal (*b*). If a person signs as agent, knowing that he has no authority, he is liable for the false representation (*c*).

When a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative character, he does not become personally liable (*d*); but the mere addition of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability (*e*).

The usual term to employ in an indorsement by an agent is "*sans recours*," or "without recourse" ("to me" being understood), or "*sans frais*."

In determining whether the signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument must be adopted (*f*).

Presentment.

The term "presentment" is used in two meanings. Sometimes it means presentment to the drawee for acceptance, and sometimes presentment for payment when the bill comes to maturity.

Dishonour and protest.

A bill is said to be "dishonoured" if either acceptance or payment is refused. If an inland bill is dishonoured, a minute may be made on it at the request of the holder by a notary public, referring to the notary's register. If a foreign bill is dishonoured, it must be "protested" before a notary public, otherwise the drawer and indorsers are discharged (*g*).

(*a*) S. 25.

(*b*) *Morison* v. *L. C. and W. Bank*, [1914] 3 K. B. 356.

(*c*) *Polhill* v. *Walter* (1832), 3 B. & Ad. 114; 37 R. R. 344; *West London Bank* v. *Kitson* (1884), 13 Q. B. D. 360.

(*d*) S. 26 (1). See *Re Barnard* (1886), 32 Ch. D. 447.

(*e*) S. 26 (1). See *Re Barnard*, *sup.*; *Elliott* v. *Bax-Ironside* (1925), 160 L. T. 27.

(*f*) S. 26 (2).

(*g*) S. 51.

Presentment for acceptance;

In order to render a party to a bill liable, presentment by the holder of a bill to the drawee for acceptance is necessary in the following cases only, namely: (1.) Where it is payable after sight, in which case it is necessary in order to fix the maturity of the instrument; or (2.) Where it expressly stipulates that it shall be presented; or (3.) Where it is drawn payable elsewhere than at the residence or place of business of the drawee (*h*).

Where presentment is optional, the object in presenting is to obtain the acceptance of the drawee, and thus to render him liable on the bill; and in case the drawee refuses to accept, or, as it is called, "dishonours" the bill, to have an immediate right to proceed against the drawer and prior indorsers (*i*).

The holder of a bill payable after sight must either present it for acceptance or negotiate it within a reasonable time; otherwise the drawer and all indorsers prior to that holder will be discharged. In determining what is reasonable time, regard must be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case (*k*).

The following rules as to due presentment for acceptance are laid down by the Act (*l*):—

> (1.) The presentment must be made by or on behalf of the holder to the drawee, or to some person authorised to accept or refuse acceptance on his behalf (*m*), at a reasonable hour on a business (*n*) day, and before the bill is overdue.
>
> (2.) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, then presentment may be made to him only.
>
> (3.) Where the drawee is dead, presentment may be made to his personal representative.
>
> (4.) Where the drawee is bankrupt, presentment may be made to him or to his trustee.
>
> (5.) Where authorised by agreement or usage, a presentment through the post-office is sufficient.

(*h*) S. 39. (*i*) S. 43. (*k*) S. 40. (*l*) S. 41 (1).

(*m*) Putting the bill into a bill-box in the usual manner is sufficient.

(*n*) Business days are defined in s. 92.

when excused.

Presentment in accordance with these rules is excused, and a bill may be treated as dishonoured by non-acceptance (*o*) :—

(1.) Where the drawee is dead or bankrupt, or is a fictitious person (*p*), or a person not having capacity to contract by bill.

(2.) Where, after the exercise of reasonable diligence, such presentment cannot be effected.

(3.) Where, although the presentment has been irregular, acceptance has been refused on some other ground.

Effect of non-acceptance.

Non-acceptance within the customary time (*q*) must be treated as dishonour, otherwise the holder loses his right of recourse against the drawer and indorsers (*r*). A bill is dishonoured if it is not accepted on presentment, or if it is not accepted when presentment is excused (*s*). The effect of such dishonour is that an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary (*t*).

A qualified acceptance may be refused by the holder and treated as dishonour; but where taken without the authority or assent of the drawer or an indorser, it not being a partial acceptance whereof due notice has been given, such drawer or indorser is discharged from liability, unless he has had notice of the qualified acceptance and has not signified his dissent within a reasonable time (*u*).

Presentment for payment.

Every bill must be duly presented for payment, or the drawer and indorsers will be discharged (*x*), except in the following cases (*y*) :—

(1.) Where, after the exercise of reasonable diligence, presentment, as required by this Act, cannot be effected;

(*o*) S. 41 (2).

(*p*) See s. 5 (2).

(*q*) The custom is to leave the bill with the drawee, if so required, for twenty-four hours, at the end of which time he must give it back, accepted or not accepted. See *Bank of Van Diemen's Land* v. *Bank of Victoria* (1871), L. R. 3 P. C. 526.

(*r*) S. 42.

(*s*) S. 43 (1).

(*t*) S. 43 (2).

(*u*) S. 44.

(*x*) S. 45.

(*y*) S. 46.

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but the fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment (z).

(2.) Where the drawee is a fictitious person (a).

(3.) As regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented.

(4.) As regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented.

(5.) By waiver of presentment, express or implied (b).

No particular form of presentment is necessary (c).

A bill is duly presented for payment if presented in accordance with the following rules (d) :—

(1.) Where the bill is not payable on demand, presentment must be made on the day it falls due (e).

(2.) Where the bill is payable on demand, then, subject to the provisions of this Act, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable. In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case.

(3.) Presentment for payment must be made by the holder, or by some person authorised to receive payment on his behalf, at a reasonable hour on a business day, at the proper place as hereinafter defined (f), either to the person designated by the bill as payer, or to some person authorised to pay or refuse payment on his behalf, if with the exercise of reasonable diligence such person can there be found (g).

(4.) Where a bill is drawn upon, or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all.

(z) Even if the acceptor tells the holder that he will not pay it when due : *Baker* v. *Birch* (1811), 3 Camp. 107; 13 R. R. 767; or becomes bankrupt before maturity : *Bowes* v. *Howe* (1813), 5 Taunt. 30; 14 R. R. 700. Cf. s. 41 (2) as to presentment for *acceptance*.

(a) See s. 5 (2).

(b) *Hopley* v. *Dufresne* (1812), 15 East, 275; 13 R. R. 463.

(c) Per Cairns, L.C., *Re East of England Bank* (1868), 4 Ch. 18.

(d) S. 45.

(e) *Ante*, p. 197.

(f) S. 45 (4), (5).

(g) The person presenting the bill must show it, and give it up n being paid : s. 52 (4).

(5.) Where the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found.

(6.) Where authorised by agreement or usage, a presentment through the post-office is sufficient.

Delay in presentment.

Delay in presentment is excused when caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence (*h*); but it must be made with reasonable diligence when the cause of delay ceases to operate (*i*).

Dishonour; effect of.

A bill is dishonoured by non-payment when on due presentment it is not paid, or when presentment is excused and the bill is overdue and unpaid (*k*). The effect of such dishonour is that an immediate right of recourse against the drawer and indorsers accrues to the holder (*k*); but he cannot sue any party until after the last day for payment (*l*).

Notice of dishonour.

Notice of dishonour, whether by non-acceptance or by non-payment, must, except in the cases mentioned below, be given to the drawer and each indorser, and any to whom notice is not given will be discharged (*m*); but if notice of dishonour for non-acceptance is not given, a holder in due course subsequent to such omission is not prejudiced (*n*); and when notice of dishonour for non-acceptance is given, notice of dishonour for non-payment is unnecessary, unless in the meantime the bill has been accepted (*m*).

Excuses for non-notice and delay.

Delay in giving notice of dishonour is excused on the same grounds as delay in presentment (*o*). Notice of dishonour is dispensed with in the following cases (*o*) :—

(1.) When, after the exercise of reasonable diligence,

(*h*) S. 46 (1). See *Rouquette* v. *Overmann* (1875), L. R. 10 Q. B. 525; *The Elmville*, [1904] P. 319.

(*i*) S. 46 (1).

(*k*) S. 47.

(*l*) *Kennedy* v. *Thomas*, [1894] 2 Q. B. 759.

(*m*) S. 48.

(*n*) *Dunn* v. *O'Keeffe* (1816), 5 M. & S. 282; 17 R. R. 326.

(*o*) S. 50. See s. 46 (1), *ante*. Notice must be given, even if the acceptor is a bankrupt: *Esdaile* v. *Sowerby* (1809), 11 East, 114; 10 R. R. 440.

notice as required by this Act cannot be given to or does not reach the drawer or indorser sought to be charged:

(2.) By waiver (*p*), express or implied; notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice.

(3.) As regards the drawer in the following cases (*q*), namely—(1) where drawer and drawee are the same person, (2) where the drawee is a fictitious person (*r*) or a person not having capacity to contract (*s*), (3) where the drawer is the person to whom the bill is presented for payment, (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill (*t*), (5) where the drawer has countermanded payment:

(4.) As regards the indorser in the following cases, namely—(1) where the drawee is a fictitious person (*u*) or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the bill, (2) where the indorser is the person to whom the bill is presented for payment, (3) where the bill was accepted or made for his accommodation.

Rules for giving notice.

Notice of dishonour must be given in accordance with the rules expressed in the Act (*x*), some of the most important of which are—

(1.) It may be given in writing or by personal communication, and in any sufficient terms. It may be partly written and partly verbal. If written, it need not be signed. If duly addressed and posted it is sufficient notwithstanding any miscarriage by the post-office. It may be given to the party himself or to his agent (*y*).

(2.) It may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter (*z*).

(3.) In the absence of special circumstances, notice is not deemed to have been given within a reasonable time, unless—where the person giving, and the person to receive notice, reside in the same place, the notice is given or sent off in time to reach the latter on the day after the

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(*p*) As to what amounts to waiver, see *Cordery* v. *Colvin* (1863), 14 C. B. (N.S.) 374; *Woods* v. *Dean* (1862), 3 B. & S. 101; *Re Fenwick, Stobart & Co.*, [1902] 1 Ch. 507.

(*q*) See *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A. C. 49.

(*r*) See s. 5 (2).

(*s*) *Leach* v. *Hewitt* (1813), 4 Taunt. 731; 14 R. R. 652.

(*t*) *Bickerdike* v. *Bollman* (1786), 1 T. R. 405; 1 R. R. 242. This is the case of the bill having been accepted for the accommodation of drawer.

(*u*) See s. 5 (2).

(*x*) S. 49.

(*y*) *Re Deep Sea Fishery Co.*, [1902] 1 Ch. 507.

(*z*) *Darbishire* v. *Parker* (1805), 6 East, 2.

dishonour of the bill (*a*); or, where they reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day, then by the next post thereafter (*b*).

(4.) Where a bill when dishonoured is in the hands of an agent he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder (*c*).

(5.) Where a party to a bill receives due notice of dishonour, he has after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonour (*d*).

"Protest."

A "protest" is a solemn declaration made by a notary public (*e*); it must contain a copy of the bill, and must be signed by the notary, and must specify the person at whose request it is made, the place and date, and the cause and reason of protest (*f*). Where the bill is lost or destroyed, or wrongfully detained, the protest may be on a copy or written particulars thereof (*g*). Where a notary cannot be obtained, it may be protested by a householder or substantial resident of the place where the bill is dishonoured, in the presence of two witnesses, in the form prescribed by the Act (*h*).

"Noting."

"Noting" is a minute made on the bill by the officer at the time of refusal of acceptance or payment, and is considered as the preparatory step to protest (*i*). Where a bill is required to be protested within a specified time, or before some further proceeding is taken, it is sufficient that the bill has been noted for protest within such time or before such proceeding, and the formal

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(*a*) *Smith* v. *Mullett* (1809), 2 Camp. 208; 11 R. R. 694.

(*b*) *Fielding* v. *Corry*, [1898] 1 Q. B. 268; *The Elmville*, [1904] P. 319.

(*c*) *Bray* v. *Hadwen* (1816), 5 M. & S. 68; 17 R. R. 277.

(*d*) See, generally, as to notice of dishonour, *Bickerdike* v. *Bollman* (1768), *sup.*

(*e*) Jacobs on Bills of Exchange, p. 132.

(*f*) S. 51 (7).

(*g*) S. 51 (8).

(*h*) S. 94, and Sched. I.

(*i*) Jacobs, p. 133.

protest may be extended at any time as of the date of the noting (*k*).

An inland bill may be noted or protested for non-acceptance or non-payment; but need not be so to preserve recourse against the drawer or indorser (*l*). The only use of protesting an inland bill is to enable it to be accepted for honour (*m*). On the other hand, a foreign bill, appearing on the face of it to be such, must be duly protested (*n*). And where the acceptor of a bill becomes bankrupt, or suspends payment before it matures, the holder may have the bill protested for better security against the drawer and indorsers (*o*).

When excused.

Protest is dispensed with by any circumstance which would dispense with notice of dishonour, and delay in noting or protesting may be excused by circumstances beyond the control of the holder (*p*).

Presentment unnecessary as against acceptor.

When a bill is accepted generally, presentment for payment is not necessary to make the acceptor liable (*q*), although as we have seen, it is necessary, unless excused, to secure recourse to the drawer or indorsers (*q*). If presentment is required by the terms of a qualified acceptance, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures (*q*). To render the acceptor liable it is not necessary to protest a bill, or to give him notice of dishonour (*q*).

Damages on dishonour of bill;

Where a bill is dishonoured, the holder may recover from any party liable on the bill; the drawer, who has been compelled to pay, from the acceptor; and an indorser, who has been compelled to pay, from the

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(*k*) S. 93. See also s. 51 (4) and Bills of Exchange (Time of Noting) Act, 1917 (7 & 8 Geo. 5, c. 48), s. 1.

(*l*) S. 51 (1).

(*m*) Ss. 65-68.

(*n*) S. 51 (1), (2). Various reasons are given for this difference: see Byles on Bills, 217.

(*o*) S. 51 (5). See *Ex p. Bank of Brazil*, [1893] 2 Ch. 438.

(*p*) S. 51 (9); and see ss. 46, 50, *ante*, p. 208.

(*q*) S. 52. See *ante*, p. 205.

acceptor or drawer or a prior indorser—the following liquidated damages (*r*) :—

(a.) The amount of the bill.

(b.) Interest from presentment for payment, if the bill is payable on demand, otherwise from maturity (*s*).

(c.) The expenses of noting or, when protest is necessary (*t*) and the protest has been extended, of protest.

Re-exchange.

Where the bill has been dishonoured abroad, in lieu of the above the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay may recover from any party liable to him, the amount of the re-exchange (*u*) with interest thereon until payment (*x*).

Where a bill is payable abroad, the holder has a right to be paid a certain sum in foreign currency in a foreign country; in other words, he is entitled, if the bill is dishonoured, as against any one liable in this country on the bill, to such a sum of English money as would purchase that amount of foreign money together with the costs of transmitting it to England, as well as the costs of protest, &c. (*y*). The easiest manner for the holder to obtain English money from the person in England liable to pay, is by drawing a bill at sight for the amount on him (*y*). The word "re-exchange" is used in this section for the amount for which the bill at sight would have to be drawn. The word is also used in the meanings of, (1) the loss on a particular transaction owing to the exchange being adverse (*z*), and (2) the course of exchange itself.

(*r*) S. 57 (1). Therefore the claim may be made under R. S. C. Order III. r. 6; see *Dando* v. *Boden*, [1893] 1 Q. B. 318.

(*s*) *Re East of England Bank* (1868), 4 Ch. 14.

(*t*) *Ex p. Bank of Brazil*, *sup.*

(*u*) As to "re-exchange," see *Willans* v. *Ayers* (1877), 3 App. Cas. 133.

(*x*) S. 57 (2). See s. 97 (2); and *Re Gillespie* (1886), 18 Q. B. D. 286; *Re Commercial Bank of S. Australia* (1887), 36 Ch. D. 522.

(*y*) *Suse* v. *Pompe* (1860), 8 C. B. (N.S.) 538, 563.

* Course of exchange.

(*z*) * The phrases "course of exchange" and exchange being "adverse" require some explanation. If A. in London owes French

Interest.

Where, by the Act, interest may be recovered as liquidated damages, it may, if justice require it, be withheld wholly or in part; and, where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper (*a*). "Interest proper" is where a bill is expressed to be payable with interest; which, unless the instrument otherwise provides, runs from the date of the bill, and, if the bill is undated, from its issue (*b*).

Acceptance for honour.

Where a bill has been protested for non-acceptance or for better security and is not overdue, any person not already liable on it may, with the consent of the holder, intervene and accept the bill *supra* protest, for the honour of any party liable on it, or of the person for whose account it is drawn (*c*); where a bill payable after sight is accepted for honour, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honour (*d*).

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money to B. in Paris, he must, if he pays in cash, send English money to Paris and therewith purchase French money with which to pay his debt. The transmission of bullion is always a costly process, owing to its weight and its liability to be stolen. The employment of bills of exchange reduces the amount of gold that has to be transmitted to a minimum. It will be obvious that if C. in Paris owed to D. in London an amount of English money equal in value to the French money due to B., both debts could be satisfied without transmitting bullion between London and Paris, by an arrangement that C. instead of A. should pay B., and that A. instead of C. should pay D. In practice A. buys in London a bill payable in Paris and transmits it to B. If the total amount of debts payable in Paris by persons in London equals the amount payable in London by persons in Paris, the price of a bill merely depends upon the relative value of sovereigns and francs, and the "rate of exchange," sometimes called the "course of exchange," is said to be at "par." But if more debts are payable in Paris by persons in London than are payable in London by persons in Paris, there will be a competition in London for bills payable in Paris, and the price will rise until it becomes cheaper to transmit bullion than to purchase bills. In this case the rate of exchange is the price given in London calculated in sovereigns for a bill payable in francs in Paris, and the exchange is said to be "adverse" to London.

(*a*) S. 57 (3); *Ward* v. *Morrison* (1842), Car. & M. 368.

(*b*) S. 9 (3).

(*c*) S. 65. The form of the acceptance may be, "Accepted S.P.," but it usually states for whose honour it is accepted. The practice is for an acceptance for honour to be attested by a notarial "act of honour" recording the transaction, but perhaps this is not necessary.

(*d*) S. 65 (5).

The acceptor for honour is liable, on due presentment, to pay according to his acceptance, if the bill is not paid by the drawee, if it has been duly presented and protested for non-payment, and he has notice thereof (*e*). He is liable to the holder and all parties subsequent to the party for whose honour he has accepted (*e*).

A dishonoured bill accepted for honour *supra* protest, or containing a reference in case of need (*f*), must be protested for non-payment before it is presented for payment to the acceptor for honour or referee in case of need; delay in presentment, or non-presentment, is excused by any circumstance which would excuse delay in presentment, or non-presentment, for payment (*g*).

Payment for honour.

Where a bill has been protested for non-payment, any person may intervene and pay it *supra* protest for the honour of any party liable on it, or of the person for whose account it is drawn (*h*); but payment for honour, to operate as such and not as a mere voluntary payment, must be attested by a notarial act (*i*).

Payment for honour discharges all parties subsequent to the party for whose honour it is made (*k*); the payer succeeds to all the rights and duties of the holder as regards the party for whose honour he pays, and all parties liable to that party (*k*), and is entitled to have the bill and protest (*l*).

If the holder refuse to receive payment *supra* protest, he will lose his right of recourse against any party who would have been discharged by such payment (*m*).

Accommodation.

Sometimes a person wishing to issue a bill will ask another to lend him his acceptance, the intention being that the latter should accept the bill, and take it up at maturity, but the former should provide the funds for

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(*e*) S. 66.
(*f*) See s. 15; *ante*, p. 198.
(*g*) S. 67. *Ante*, p. 206.
(*h*) S. 68 (1), (2).
(*i*) S. 68 (3); *Ex p. Wyld* (1860), 2 De G. F. & J. 642.
(*k*) S. 68 (5).
(*l*) S. 68 (6).
(*m*) S. 68 (7).

so doing or indemnify the acceptor (*n*). Such a bill is called an "accommodation bill." In a case of this nature the acceptor, who according to the terms of the bill is the principal debtor, is really merely a surety. It follows that, if he pays the bill, he has the rights of a surety, *e.g.*, he is entitled to the benefit of all the securities held by the creditor (*o*).

The Act of 1882 defines an "accommodation party" as "a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person" (*p*); and provides that he is liable to a holder for value, whether the holder took the bill with knowledge of the facts or not (*p*).

Where several persons are accommodating parties, their rights, *inter se*, are those of co-sureties, irrespective of the position of their names on the instrument (*q*).

It will be observed that the accommodation party becomes liable as soon as value is given, and notice to the party giving value is immaterial.

Holder.

The "holder" means the payee or indorsee of a bill who is in possession of it, or the bearer thereof (*r*).

Holder in due course.

The "holder of a bill in due course," which expression takes the place of "*bona fide* holder for value without notice," or "innocent indorsee," is thus defined (*s*):—

> (1.) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely,—
> (1) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact:
> (ii) That he took the bill in good faith and for value (*t*), and that at the time the bill was

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(*n*) *Yates* v. *Hoppe* (1850), 19 L. J. C. P. 180.

(*o*) *Bechervaise* v. *Lewis* (1872), L. R. 7 C. P. 377. See *ante*, p. 184.

(*p*) S. 28.

(*q*) *Reynolds* v. *Wheeler* (1861), 10 C. B. (N.S.) 561; *Macdonald* v. *Whitfield* (1883), 8 App. Cas. 733. *Ante*, pp. 181-2.

(*r*) S. 2.

(*s*) S. 29. See *Herdman* v. *Wheeler*, [1902] 1 K. B. 361.

(*t*) As to "value," see *ante*, p. 198.

> negotiated to him he had no notice of any defect in the title of the person who negotiated it.
>
> (2.) In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.
>
> (3.) A holder (whether for value or not), who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

Presumption of good faith.

Every holder is *prima facie* deemed to be a holder in due course; but if in an action on the bill it is admitted or proved that the acceptance, issue, or negotiation is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has been given in good faith (*u*). This does not shift the burden of proof when the person to whom the bill was originally delivered and who is still in possession of it is seeking to enforce it (*x*).

Thus, where a wife was sued on a promissory note which she had signed under duress on the part of her husband, as surety for the repayment of money advanced to her husband by the plaintiff, no evidence being given that the plaintiff was aware of the duress, it was held that the onus of proof that the plaintiff had knowledge of the duress was on the defendant and that the provision in sect. 30 (2) did not shift the burden of proof so as to require the plaintiff to prove that he was not aware that the defendant had signed under duress (*x*).

"Holder in due course" does not include the original payee, so that if A. induces B. by false pretences to draw a cheque in favour of C., who gives value in good faith without notice of the fraud, C., being the original payee, is not a holder in due course, and B. on discovering the

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(*u*) S. 30 (2). *Tatam* v. *Haslar* (1889), 23 Q. B. D. 345.
(*x*) *Talbot* v. *Von Boris*, [1911] 1 K. B. 854.

fraud, may recover from C. the amount paid on the cheque, or refuse to honour the cheque if it has not already been paid (*y*).

Good faith.

A thing is deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not (*z*).

Negotiation.

A bill is "negotiated" when it is so transferred from one person to another as to make the transferee the "holder" (*a*). A bill payable to bearer is negotiated by delivery (*b*), and a bill payable to order, by indorsement (*c*) of the holder completed by delivery (*cc*). If the holder of a bill payable to order transfers for value without indorsement, the transferee acquires such title as the transferor had (*d*), and also a right to have the indorsement of the transferor (*e*).

Indorsement.

A person who is under an obligation to indorse a bill in a representative capacity may indorse it in such terms as to negative personal liability (*f*).

The indorsement must be written on the bill itself, or sometimes on an "allonge," that is, a slip of paper attached to the bill, where there is not room on the bill for all the indorsements (*g*).

Requisites of indorsement.

An indorsement must be of the whole bill. A partial indorsement, *i.e.*, one which purports to transfer part only of the amount payable, or to transfer to two or more indorsees severally, does not operate as a negotiation of the bill (*h*).

Where in a bill payable to order the payee or indorsee

(*y*) *Jones, Ltd.* v. *Waring & Gillow, Ltd.*, [1926] A. C. 676.

(*z*) S. 90. See *ante*, p. 190.

(*a*) S. 31. See *Day* v. *Longhurst* (1893), 62 L. J. Ch. 334.

(*b*) "Delivery" means transfer of possession, actual or constructive, from one person to another: s. 2.

(*c*) That is, by signature of the holder on the bill: s. 32. See *Re Barrington* (1804), 2 Sch. & L. 112; 9 R. R. 61; *Ex p. Yates* (1858), 2 De G. & J. 191.

(*cc*) S. 31.

(*d*) *Whistler* v. *Forster* (1863), 14 C. B. (N.S.) 248.

(*e*) S. 31 (4). See *Day* v. *Longhurst*, *sup.* See s. 58, *ante*, p 194.

(*f*) S. 31 (5). See ss. 16, 26, *ante*, p. 204.

(*g*) S. 32 (1).

(*h*) S. 32 (2).

is wrongly designated or his name is misspelt, he may indorse the bill as therein described, adding, if he thinks fit, his proper signature (*i*). Where a bill is made payable to the order of a married woman thus, "To Mrs. John Jones or order," the generally accepted indorsement is (say), "Martha Jones, wife of John Jones" (*k*).

Indorsements are deemed to have been made in the order in which they appear on the bill until the contrary is proved (*l*).

Conditional acceptance or indorsement.

Although the drawing of a bill must be unconditional, the acceptance may be conditional (*m*), as, for instance, "payable on delivery of bills of lading": so an indorsement is not void because it purports to be conditional, but the condition may be disregarded by the payer, and payment to the indorsee will be valid whether the conditions have been fulfilled or not (*n*).

Indorsement in blank, or special,

An indorsement "in blank" specifies no indorsee, and the bill is payable to bearer; a "special" indorsement specifies the person to whom, or to whose order, the bill is payable (*o*).

or restrictive,

The indorsement may be restrictive (*p*), *i.e.*, it may prohibit the further negotiation of the bill, or may be expressed to be a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof, as, for example, if the bill be indorsed "Pay D. only," or "Pay D. for the account of X.," or "Pay D. or order for collection." A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party thereto whom his indorser could have sued; but it gives him no power to transfer his rights as indorsee unless it expressly authorises him

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(*i*) S. 32 (4).

(*k*) See Chalmers on Bills of Exchange (ed. 8), p. 128.

(*l*) S. 32 (5). See *Macdonald* v. *Whitfield* (1883), 8 App. Cas. 733.

(*m*) S. 19 (2) (*a*); *ante*, p. 199.

(*n*) S. 33. This was not the law before the Act of 1882; see *Robertson* v. *Kensington* (1811), 4 Taunt. 30.

(*o*) S. 34 (1), (2); s. 32 (6). See the distinction between these indorsements explained in *Harmer* v. *Steele* (1849), 4 Ex. 1.

(*p*) S. 32 (6).

so to do (*q*). In a case of this nature the indorsee is practically the agent for the indorser (*r*).

Negotiation of overdue bill;

A negotiable bill continues to be such until it has been restrictively indorsed, or discharged by payment or otherwise (*s*). An overdue bill, however, can only be negotiated subject to any defect of title affecting it at its maturity, and the transferee can only acquire or give such title as the person from whom he took it had (*t*). A bill payable on demand is overdue when it appears on the face of it to have been in circulation for an unreasonable time (*u*); what is an unreasonable time is a question of fact (*u*). Every negotiation is presumed to have been effected before the bill was overdue, unless the indorsement is dated after maturity (*x*).

of dishonoured bill.

A person who takes a dishonoured bill, not overdue, with notice of the dishonour, takes it subject to any defect of title attaching at the time of dishonour; but the rights of a "holder in due course" are not affected (*y*).

Rights and powers of holder.

The holder may sue on a bill in his own name (*z*). If he is a holder in due course, he holds the bill free from any defect of title of prior parties, and may enforce payment against all parties liable on the bill (*a*). Where his title is defective, if he negotiates to a holder in due course, that holder obtains a good and complete title, and if he obtains payment the payer is discharged (*b*).

(*q*) S. 35. Examples of restrictive indorsements will be found in *Ancher* v. *Bank of England* (1781), 2 Doug. 637; *Sigourney* v. *Lloyd* (1828), 8 B. & C. 622; 5 Bing. 525; 32 R. R. 504.

(*r*) *Williams, Deacon & Co.* v. *Shadbolt* (1885), C. & E. 529.

(*s*) S. 36 (1); *Callow* v. *Lawrence* (1814), 3 M. & S. 95; 15 R. R. 423.

(*t*) S. 36 (2). See *Holmes* v. *Kidd* (1858), 3 H. & N. 891; *Lloyd* v. *Howard* (1850), 15 Q. B. 995.

(*u*) S. 36 (3). See *London, &c. Bank* v. *Groome* (1881), 8 Q. B. D. 288. As to bills not payable on demand, see s. 14, *ante*, p. 197.

(*x*) S. 36 (4). See *Lewis* v. *Parker* (1836), 4 A. & E. 838; 43 R. R. 493; *Bounsall* v. *Harrison* (1836), 1 M. & W. 611; 46 R. R. 420.

(*y*) S. 36 (5). See *Crossley* v. *Ham* (1811), 13 East, 498; 12 R. R. 410; *Hornby* v. *McLaren* (1908), 24 T. L. R. 494.

(*z*) S. 38 (1). See *Crouch* v. *Crédit Foncier* (1873), L. R. 8 Q. B. 380.

(*a*) S. 38 (2).

(*b*) S. 38 (3).

Stolen or forged bill.

It will be remembered that the Larceny Act, 1861 (*c*), providing for the revesting of stolen property on the conviction of the thief, does not apply to negotiable instruments; and that a forged signature is wholly inoperative (*d*).

Discharge of bill;

A bill is discharged (*e*) :—

(1) by payment (*f*) in due course (that is, at or after maturity to the holder in good faith and without notice of defect in his title) by or on behalf of the drawee or acceptor (*g*) :

(2) if an accommodation bill, when paid in due course by the party accommodated (*h*) :

(3) when the acceptor is the holder at or after maturity in his own right (*i*) :

(4) when the holder at or after maturity unconditionally renounces his rights against the acceptor; but such renunciation must be in writing, unless the bill is delivered up to the acceptor (*k*) :

(5) where it is intentionally and apparently (*l*) cancelled by the holder or his agent (*m*).

by alteration.

Also, where a bill or acceptance is materially altered without the assent of all parties, the bill is discharged, except against the party who made, authorised, or

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(*c*) 24 & 25 Vict. c. 96, s. 100, repealed and re-enacted by Larceny Act, 1916, s. 45, *ante*, p. 56; see *Chichester* v. *Hill* (1882), 52 L. J. Q. B. 160.

(*d*) *Ante*, p. 202.

(*e*) *I.e.*, all rights of action on the bill are extinguished. This has nothing to do with the question whether other rights of action arising out of the bill transaction still exist: *Harmer* v. *Steele* (1849), 4 Ex. 1; and it must be distinguished from discharge of the parties: *O'Keeffe* v. *Dunn* (1815), 6 Taunt. 315; 16 R. R. 623.

(*f*) "Payment" is not a technical word: *per* Maule, J., *Maillard* v. *Argyle* (1843), 6 M. & Gr. 45. It may be made without money, *e.g.*, set off of another debt.

(*g*) Act of 1882, s. 59 (1). As to payment by drawer or indorser, see s. 59 (2).

(*h*) S. 59 (3).

(*i*) S. 61. See *Nash* v. *De Freville*, [1900] 2 Q. B. 72.

(*k*) S. 62; *Harmer* v. *Steele*, *sup.*; *Re George* (1890), 44 Ch. D. 627; *Edwards* v. *Walters*, [1896] 2 Ch. 157; *Re Dickinson* (1909), 101 L. T. 27. See *ante*, p. 108.

(*l*) *Leeds Bank* v. *Walker* (1883), 11 Q. B. D. 84.

(*m*) S. 63.

assented to the alteration, and subsequent indorsers; provided that, where the alteration is not apparent, the holder in due course may avail himself of the bill as if it had not been altered, and may enforce payment according to its original tenor (*n*). Where the alteration is such as to make a fresh stamp requisite, penalties may be incurred, and a person taking the bill may be prevented by the Stamp Acts from recovering upon it (*o*).

A person who inadvertently accepts a bill in such a form as to facilitate an alteration in the amount does not thereby become liable to pay the altered amount to a holder in due course (*p*).

But where a bill or cheque is drawn on a bank of which the acceptor of the bill or the drawer of the cheque is a customer, there is a legal duty to take reasonable precautions against fraudulent alterations, and if, as the result of failure to take such precautions, a fraud is committed, the customer, as between himself and the bank, will have to bear any loss thereby occasioned (*q*).

Bills in a set.

Foreign bills are often drawn in duplicate or in "a set," each part of the set being numbered and referring to the other parts; for instance :—

> CALCUTTA, 1 Jan. 1930.
>
> £5,000.
>
> At three months after sight pay this first of exchange (second and third not paid) to the order of Mr. John Jones the sum of £5,000 sterling value in account.
>
> B. BROWN & Co.
>
> To R. ROBINSON & Co.

(*n*) S. 64; but see as to supplying material omissions, s. 20, *ante*, p. 200. For instances of material alterations, see s. 64 (2), and notes to *Master* v. *Miller* (1791), 1 Sm. L. C. (ed. 13) 815; and as to the proviso, see *Leeds Bank* v. *Walker*, *sup.*; *Scholfield* v. *Londesborough*, [1894] 2 Q. B. 660; *Bank of Montreal* v. *Exhibit Co.* (1906), 11 Com. Cas. 250; *Woollatt* v. *Stanley* (1928), 138 L. T. 620.

(*o*) S. 97; Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 38, as amended by 9 Edw. 7, c. 43, s. 10; Finance Act, 1918, s. 36.

(*p*) *Scholfield* v. *Londesborough*, [1896] A. C. 514.

(*q*) *Young* v. *Grote* (1827), 4 Bing. 253; *London Joint Stock Bank* v. *Macmillan*, [1918] A. C. 777.

The whole of the parts constitute one bill (*r*), and therefore, where one part of the set is duty stamped, the others are exempt from duty, unless issued or negotiated separately from the stamped part (*s*). Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every subsequent indorser is liable on the part he has himself indorsed, as if the parts were separate bills (*t*). Where two or more parts are negotiated to different holders in due course, the holder whose title first accrues is, as between such holders, deemed the true holder of the bill; but this does not affect the rights of a person who in due course accepts or pays the part first presented to him (*u*). If the drawee accepts more than one part, and his acceptances get into the hands of different holders in due course, he will be liable on each part as on a separate bill (*x*).

Lost bills.

If a bill is lost before it is overdue, the person who was the holder may compel the drawer to give him another bill of the same tenor upon receiving a full indemnity against all claims on the lost bill (*y*). In any proceedings upon a bill, it may be ordered that the loss thereof shall not be set up provided that a satisfactory indemnity be given (*z*).

Conflict of laws.

"Sometimes," says Mr. Justice Byles (*a*), "bills drawn in England are payable in a foreign country, and bills drawn in a foreign country are payable in England. Sometimes English bills circulate abroad, and foreign bills circulate here: and frequently suits on foreign bills, or bills negotiated abroad, are brought in English Courts of Justice. The laws of foreign countries, as to bills of exchange, often differ widely from the law of England, and from each other. But natural justice, mutual convenience, and the practice of all civilised nations,

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(*r*) Act of 1882, s. 71.

(*s*) The Stamp Act, 1891, s. 39.

(*t*) Act of 1882, s. 71 (2).

(*u*) S. 71 (3).

(*x*) S. 71 (4); *Holdsworth* v. *Hunter* (1830), 10 B. & C. 449; 34 R. R. 479.

(*y*) S. 69. See *Charnley* v. *Grundy* (1854), 14 C. B. 608; *Thairlwall* v. *G. N. R. Co.*, [1910] 2 K. B. 509.

(*z*) S. 70.

(*a*) Byles on Bills, 380.

> require that contracts, wherever enforced, should be regulated and interpreted according to the laws with reference to which they were made; otherwise the rights and liabilities of parties would entirely depend on the law of the country where the remedy might happen to be sought. Such a state of things would introduce uncertainty and confusion infinitely greater than arises from that measure of respect and comity which every tribunal now shows to the law of foreign nations."

Therefore, the Bills of Exchange Act, 1882, provides that where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined generally by the law of the place in which the contract was made, or the act was done or to be done (*b*): provided that, where an inland bill has been indorsed in a foreign country, the indorsement, as regards the payer, is to be interpreted by the law of this country (*c*). The validity as regards requisites in form is determined by the law of the place of issue; as regards requisites in form of the supervening contracts, as acceptance or indorsement, by the law of the place where such contract was made (*d*).

§ 3. *Cheques.*

Cheques.

The Bills of Exchange Act, 1882, also deals with cheques, and generally reproduces with slight additions the Crossed Cheques Act, 1876 (*e*). A cheque is defined to be "a bill of exchange drawn on a banker payable on demand"; and generally the provisions of the Act applicable to a bill of exchange payable on demand apply to a cheque (*f*).

A bill of exchange is an "unconditional" order to pay (*g*), and therefore a cheque with a condition

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(*b*) S. 72. See *Alcock* v. *Smith*, [1892] 1 Ch. 238; *Embiricos* v. *Anglo-Austrian Bank*, [1904] 2 K. B. 870; *Koechlin et Cie* v. *Kestenbaum*, [1927] 1 K. B. 889.

(*c*) S. 72 (2).

(*d*) S. 72. See *Horne* v. *Rouquette* (1878), 3 Q. B. D. 514; *Re Marseilles Co.* (1885), 30 Ch. D. 598. See Chalmers (4th ed.), Intro., p. xl.

(*e*) 39 & 40 Vict. c. 81, repealed by s. 96 of the Act of 1882.

(*f*) S. 73; *M'Lean* v. *Clydesdale Banking Co.* (1883), 9 App. Cas. 95.

(*g*) *Ante*, pp. 195-6; *Roberts & Co.* v. *Marsh*, [1915] 1 K. B. 42.

attached, for instance, that the payee shall sign a form of receipt attached to the cheque, is not a "cheque" within the meaning of the Act (*h*). The Revenue Act, 1883 (*i*), however, extends the provisions of sects. 76—82 of the Act of 1882 (*i.e.*, as to crossed cheques (*k*)), to any document issued by a customer of a banker and intended to enable any person to obtain payment from the banker of the sum named therein as if it were a cheque, but not so as to make it a negotiable instrument (*l*).

Presentment for payment.

Subject to the permitted excuses for delay or non-presentment for payment (*m*), the Act provides (*n*) :—

> (1.) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid.
>
> (2.) In determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.
>
> (3.) The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him.

This section effected a change in the law :—

> "It was introduced to mitigate the rigour of the common law rule. At common law the mere omission to present a cheque for payment did not discharge the drawer, until at any rate six years had elapsed, and in this respect the common law appears to be unaltered. But if a cheque was not presented within a reasonable time, as defined by the cases, and the drawer suffered actual damage by the delay, *e.g.*, by the failure of the bank, the drawer was absolutely discharged, even though ultimately the bank might pay (say) fifteen shillings in the pound" (*o*).

(*h*) See *Bavins* v. *Lond. & S. W. Bank*, [1900] 1 Q. B. 270, 272, n.; *Thairlwall* v. *G. N. R. Co.*, [1910] 2 K. B. 509; cf. *Nathan* v. *Ogdens* (1905), 22 T. L. R. 57.

(*i*) 46 & 47 Vict. c. 55, s. 17.

(*k*) *Post*, pp. 225-8.

(*l*) See note (*h*), *sup.*

(*m*) S. 46, *ante*, pp. 206-7.

(*n*) S. 74.

(*o*) Chalmers on Bills of Exchange (ed. 8), p. 287.

Chap. X.

Banker's duty and authority;

The relation of banker and customer is that of debtor and creditor, not that of trustee and *cestui que trust* (*p*); the customer is the creditor, and has a right to draw cheques on the banker to the extent of the amount for which he is creditor. If the banker, having sufficient funds of the customer in his hands, dishonours his customer's cheque, he is liable to him in an action (*q*). If the bank have several branches, a customer having an account at one branch is not generally entitled to draw on another branch (*r*).

determination of.

A banker's duty and authority to pay his customer's cheque are determined by countermand of payment (*s*), or by notice of his customer's death (*t*) or lunacy (*u*); if a receiving order is made against the customer, or the banker has notice of an available act of bankruptcy committed by him, the banker can refuse to pay his cheques (*x*).

A cheque taken in payment remains the property of the payee so long as it remains unpaid. When paid the banker is entitled to keep it as a voucher till his account is settled; after that the drawer is entitled to it as a voucher between him and the payee (*y*).

Crossed cheques; general;

A cheque is crossed *generally* by the addition across its face of the words "and company," or any abbreviation thereof, between two parallel transverse lines, either with or without the words "not negotiable"; or of such lines simply, either with or without the words "not negotiable" (*z*).

special.

It is crossed *specially* by the addition across its face

(*p*) *Foley* v. *Hill* (1848), 2 H. L. C. 28; cf. *Joachimson* v. *Swiss Bank Corporation*, [1921] 3 K. B. 110.

(*q*) See *Fleming* v. *Bank of New Zealand*, [1900] A. C. 577.

(*r*) Chalmers (ed. 8), p. 292; *Clare & Co.* v. *Dresdner Bank*, [1915] 2 K. B. 576. As to branch banks, see *Prince* v. *Oriental Bank* (1878), 3 App. Cas. 325.

(*s*) S. 75. *Cohen* v. *Hale* (1878), 3 Q. B. D. 371.

(*t*) S. 75. *Rogerson* v. *Ladbroke* (1822), 1 Bing. 93.

(*u*) See *Yonge* v. *Toynbee*, [1910] 1 K. B. 215.

(*x*) See *McCarthy* v. *Capital & Counties Bank*, [1911] 2 K. B. 1088.

(*y*) *Charles* v. *Blackwell* (1877), 2 C. P. D. 162.

(*z*) S. 76 (1).

of the name of a banker either with or without the words "not negotiable" (*a*).

A/c payee.

It has become a frequent practice of recent years to add the words "a/c payee" to the crossing of a cheque. This means that the cheque should be cashed only by being paid into the account of the payee at his bank. It would be strong evidence of negligence on the part of a banker paying it otherwise (*b*).

Crossing by drawer, or after issue;

As to crossing, the Act of 1882 provides (*c*) :—

> (1.) A cheque may be crossed generally or specially by the drawer.
>
> (2.) Where a cheque is uncrossed, the holder may cross it generally or specially (*d*).
>
> (3.) Where a cheque is crossed generally, the holder may cross it specially (*e*).
>
> (4.) Where a cheque is crossed generally or specially, the holder may add the words "not negotiable."
>
> (5.) Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection.
>
> (6.) Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself.

material part of cheque.

The crossing is a material part of the cheque and may not lawfully be obliterated, or, except as authorised by the Act, be added to or altered (*f*).

Duties and liabilities of banker as to crossed cheque.

A banker on whom a cheque is drawn who pays it, if crossed generally, otherwise than to a banker, or, if crossed specially, otherwise than to the banker to whom it is crossed, is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid (*g*). But if the cheque is apparently not crossed, or an obliteration or alteration of the crossing is not apparent, the banker who pays in good faith without negligence is protected (*g*).

(*a*) S. 76 (2).

(*b*) *House Property Co.* v. *L. C. & W. Bank* (1915), 84 L. J. K. B. 1846. See also *National Bank* v. *Silke*, [1891] 1 Q. B. 435.

(*c*) S. 77.

(*d*) See *Capital & Counties Bank* v. *Gordon*, [1903] A. C. 240.

(*e*) *Akrokerri Mines, Lim.* v. *Economic Bank*, [1904] 2 K. B. 465.

(*f*) S. 78.

(*g*) S. 79.

Protection to banker and drawer.

Where a banker on whom a cheque is drawn pays it, if crossed generally, to a banker, or, if crossed specially, to the banker to whom it is crossed, in good faith and without negligence, such banker, and, if the cheque has come to the hands of the payee, the drawer, have the same rights and are in the same position as if payment had been made to the true owner of the cheque (*h*).

Cheque crossed "not negotiable."

Where a person takes a cheque crossed "not negotiable," he neither has, nor can give, a better title to it than that which the person from whom he took it had (*i*). Therefore, if such a cheque be stolen and afterwards be cashed by (say) a tradesman in good faith, he does not get, and cannot give, a better title to it than the thief.

Cheque crossed "a/c payee."

Where a cheque is crossed "a/c payee" the cheque should only be paid through the banking account of the payee (*k*), or, if paid otherwise, such payment will be made at the peril of the banker or person cashing the cheque.

Protection to collecting banker.

Where a banker in good faith and without negligence (*l*) receives payment for a customer (*m*) of a cheque crossed generally or specially to himself, and the customer has either no title or a defective title to it, the banker is not liable to the true owner by reason only of having received such payment (*n*). A banker who took a crossed cheque from a customer and at once credited him with the amount before it was paid by the bank upon which it was drawn, and then received payment of the cheque, was not protected by the above provision,

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(*h*) S. 80.

(*i*) S. 81. As to the conditions necessary to make a cheque not negotiable, see *National Bank* v. *Silke*, [1891] 1 Q. B. 435.

(*k*) *Ante*, p. 226.

(*l*) *Hannan's Co.* v. *Armstrong* (1900), 5 Com. Cas. 188; *Ross* v. *London County, &c., Bank*, [1919] 1 K. B. 678; *Underwood* v. *Bank of Liverpool*, [1924] 1 K. B. 775.

(*m*) *G. W. R. Co.* v. *Lond. & County Bank*, [1901] A. C. 414; as to the meaning of "customer," see *Taxation Commissioners* v. *English, Scotch and Australian Bank*, [1920] A. C. 683, at p. 687.

(*n*) S. 82. See *Kleinwort* v. *Comptoir National*, [1894] 2 Q. B. 157; *Ross* v. *London County, &c. Bank*, *sup.*; *Underwood* v. *Bank of Liverpool*, *sup.*

because he did not receive payment for the customer but for himself as holder for value (*o*); but now, by the Bills of Exchange (Crossed Cheques) Act, 1906, it is provided that in such a case the banker will be deemed to receive payment for the customer within the meaning of sect. 82 (*p*).

Forged indorsement.

A banker who in good faith pays his customer's genuine cheques held under a forged or unauthorised indorsement is deemed to have paid it in due course, and is entitled to debit his customer with the amount (*q*).

But a customer owes a duty to his banker to use reasonable care in drawing cheques, and if the customer's negligence (as, for instance, by leaving spaces which can readily be utilised for the purpose of altering the amount) enables a fraudulent alteration to be made, the customer must bear the loss (*r*).

§ 4. *Promissory Notes.*

Promissory notes.

Besides cheques, the Bills of Exchange Act, 1882, also deals with promissory notes.

The following is a form of promissory note :—

London, July 1, 1929.
£100.
Two months after date I promise to pay to Mr. John Jones or order one hundred pounds for value received.
Benjamin Brown.

"At common law no note of hand was transferable; and before the stat. 3 & 4 Anne, c. 9, it was the opinion of Lord Holt and nearly all the judges, that no action could be maintained, even by the payee, on a promissory note as an instrument, but that it was only evidence of a debt. That statute first made promissory notes assignable and indorsable, like bills of exchange, and enabled the holder to bring his action on the note itself" (*s*).

(*o*) *Capital & Counties Bank* v. *Gordon*, [1903] A. C. 240.

(*p*) 6 Edw. 7, c. 17.

(*q*) 16 & 17 Vict. c. 59, s. 19, reproduced by s. 60 of the Act of 1882, *ante*, p. 203; see *Charles* v. *Blackwell*, *sup.*; *Capital & Counties Bank* v. *Gordon*, *sup.* This applies only to bills "payable to order on demand" (including cheques).

(*r*) *Young* v. *Grote* (1827), 4 Bing. 253; *London Joint Stock Bank* v. *Macmillan*, [1918] A. C. 777.

(*s*) Byles on Bills, 7.

Definition.

By the Act of 1882, a promissory note is defined to be "an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer" (*t*).

If drawn payable to the maker's order, it is not a note within this section until indorsed by him (*u*). It may contain also a pledge of collateral security with authority to sell or dispose thereof (*x*).

Inland or foreign.

An inland note is one which is, or on the face of it purports to be, both made and payable within the British Isles; any other note is a foreign note (*y*).

Delivery necessary.

Like a bill of exchange, which is incomplete and revocable until delivery (*z*), a note is inchoate only and incomplete until delivery, actual or constructive, to the payee or bearer (*a*).

Joint and several.

But, unlike a bill of exchange, it may be made by two or more makers liable jointly, *or* jointly and severally, according to its tenor (*b*). Where it runs "I promise to pay," but is signed by two or more, it is deemed their joint and several note (*c*). Conversely, where it runs "we promise to pay," it is a joint note only.

Presentment for payment.

Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of indorsement, or the indorser will be discharged (*d*). For determining what is reasonable time, regard must be had to the nature of the instrument, the usage of trade, and the facts of the particular case (*e*);

(*t*) S. 83 (1). See *Kirkwood* v. *Carroll*, [1903] 1 K. B. 531; *Mason* v. *Lack* (1929), 45 T. L. R. 363.

(*u*) S. 83 (2). See *Good* v. *Walker* (1892), 61 L. J. Q. B. 736.

(*x*) S. 83 (3).

(*y*) S. 83 (4).

(*z*) S. 21, *ante*, p. 200.

(*a*) S. 84.

(*b*) S. 85 (1).

(*c*) S. 85 (2).

(*d*) S. 86 (1). See s. 10, *ante*, p. 197, as to when it is payable on demand.

(*e*) S. 86 (2). See s. 45 (2), *ante*, p. 207.

but, unlike a bill of exchange, the note is not to be deemed overdue, so as to affect the holder with defects of title of which he had no notice, because a reasonable time for presenting it for payment has elapsed since its issue (*f*).

Where a note is in the body of it made payable at a particular place, presentment of it at that place for payment must be made to render the maker or indorser liable; but otherwise presentment for payment is not necessary to render the maker liable (*g*). But presentment for payment is always necessary to render an indorser liable (*h*). Where a place of payment is indicated by way of memorandum only, presentment to the maker elsewhere, if sufficient in other respects, will suffice to render the indorser liable (*i*).

Liability of maker.

The maker of a note engages that he will pay according to its tenor; and he is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse (*k*).

Application of provisions as to bills of exchange.

Subject as above, the provisions of the Act relating to bills of exchange apply, with the necessary modifications (*l*), to promissory notes, except the provisions relating to (1) presentment for acceptance, (2) acceptance, (3) acceptance *supra* protest, and (4) bills in a set (*m*). Where a foreign note is dishonoured, protest is unnecessary (*m*).

In applying the provisions applicable, the maker of the note corresponds with the acceptor of a bill, and the first indorser with the drawer of an accepted bill payable to drawer's order (*n*).

An "I O U" is an acknowledgment of debt merely,

(*f*) S. 86 (3). See s. 36 (3), *ante*, p. 219.
(*g*) S. 87 (1).
(*h*) S. 87 (2). See ss. 45 and 46, *ante*, p. 206.
(*i*) S. 87 (3).
(*k*) S. 88.
(*l*) *Leeds Bank* v. *Walker* (1883), 11 Q. B. D. 84.
(*m*) S. 89 (1), (3), (4).
(*n*) S. 89 (2).

and does not amount to a promissory note. The following is a form :—

"I O U."

London, July 1, 1929.

Mr. John Jones,
I O U £100.
Benjamin Brown.

It is evidence only of a debt due, and therefore does not require a stamp; but if it contains words converting it into a promissory note, for instance, amounting to an agreement to pay on a given day, it must be stamped as such (*o*).

§ 5. *Securities for Bills of Exchange* (*p*).

If goods are sold to be paid for by bills drawn by the seller on and accepted by the buyer, and the buyer fails, or dishonours the bill, the lien of the seller as unpaid vendor (*q*) revives in the absence of special contract, if he has retained the goods or can stop them *in transitu* (*r*).

Where the drawer of a bill remits goods or securities to the drawee as cover and the latter fails, so that the former has to take up the bill, he is entitled to the return of any of the goods or securities remaining in specie in the hands of the drawee (*s*). If the drawee accepts he acquires (*t*), but if he does not accept he does not acquire (*u*) a lien on the cover; and if he fails during the currency of the bill, or does not pay it at maturity, he loses any lien on the cover (*x*).

If a bill be drawn on or accepted by a person who has in his hands funds of the drawer, or who is indebted to the drawer in a sum sufficient to meet it, the bill does not operate as an assignment of the funds or debt to the

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(*o*) See Byles on Bills, Chap. IV.

(*p*) This subject is fully discussed in Chalmers on Bills of Exchange (ed. 8), 343 *et seq.*, from which the following remarks are abbreviated.

(*q*) *Ante*, p. 77.

(*r*) *Ante*, p. 78.

(*s*) *Re Broad* (1884), 13 Q. B. D. 740.

(*t*) *Shepherd* v. *Harrison* (1871), L. R. 5 H. L. 116.

(*u*) *Re Pavy's Co.* (1876), 1 Ch. D. 631.

(*x*) *Ex p. Gomez* (1875), 10 Ch. 639.

drawee (*y*); but such assignment can be effected by a collateral agreement (*z*).

Where a bill is on the face of it expressed to be drawn against specified cover, the holder acquires no charge on the cover if the bill be dishonoured (*a*); but such charge can be created by express agreement. This rule is subject to the exception that where the estates of two insolvent parties, both liable in respect of a bill to the holder, are being administered by the Court, and one of these parties holds cover belonging to the other of them, the holder is entitled to have the cover applied in payment of the bill if that cover remains unrealised at the time of the failure of the party holding it (*b*).

Where a bill accepted for value is dishonoured and the drawer or an indorser has to pay it, he is entitled to the benefit of any securities which were deposited by the acceptor with the holder to secure the payment of the bill, and which the holder had in his possession at the time of the dishonour of the bill. The right is not dependent on express contract, but arises from the right of indemnity which the indorser paying the debt (who is a mere surety for the acceptor) has to be indemnified by the latter (*c*).

Where an accommodation party is compelled to pay a bill, he is entitled to the benefit of any securities deposited by the person accommodated with the holder as security for the payment of the bill (*d*).

(*y*) Bills of Exchange Act, 1882, s. 53; *Shand* v. *Du Buisson* (1874), 18 Eq. 283.

(*z*) *Thomson* v. *Simpson* (1870), 5 Ch. 659.

(*a*) *Banner* v. *Johnston* (1871), L. R. 5 H. L. 157.

(*b*) *Ex p. Waring* (1815), 19 Ves. 345; 13 R. R. 217; *Powles* v. *Hargreaves* (1853), 3 De G. M. & G. 430; *Ex p. Dever* (1884), 14 Q. B. D. 611. See per Lord Selborne, C., in *Royal Bank of Scotland* v. *Commercial Bank of Scotland* (1882), 7 App. Cas. 384.

(*c*) *Duncan, Fox & Co.* v. *N. & S. Wales Bank* (1881), 6 App. Cas. 1, *Ante*, pp. 182 *et seq.*

(*d*) *Bechervaise* v. *Lewis* (1872), L. R. 7 C. P. 372. *Ante*, p 215.

§ 6. *Bank Notes—Dividend Warrants—Exchequer Bills.*

Bank notes.

Bank notes are promissory notes and therefore negotiable (*e*); but their issue is subject to certain restrictions, having for their object the protection of the monopoly of the Bank of England (*f*).

Dividend warrants.

"Dividend warrants," *i.e.*, warrants issued by the Bank of England for the payment of dividends on Government stock, are to be "deemed to be cheques within the meaning of the Bills of Exchange Act, 1882" (*g*); and the provisions of that Act as to crossed cheques apply to dividend warrants (*h*); but that Act is not to affect the validity of any usage relating to dividend warrants or the indorsement thereof (*i*).

Exchequer bills.

Exchequer bills are negotiable instruments (*k*).

These are securities issued by the Treasury bearing interest at such a rate as shall be notified from time to time by the Treasury in the *London Gazette*, entitling the holder to be paid at the Bank of England, out of the Consolidated Fund, the sum stated in the bill at the expiration of any period of twelve months, not later than five years from the date thereof. Interest coupons are annexed to the bills (*l*). The money borrowed by means of these bills and similar securities issued by the Treasury constitutes the unfunded debt of the Government.

(*e*) *Miller* v. *Race* (1758), 1 Burr. 452; 1 Sm. L. C. (ed. 13) 524.

(*f*) 7 & 8 Vict. c. 32; 17 & 18 Vict. c. 83, s. 11.

(*g*) National Debt Conversion Act, 1888 (51 Vict. c. 2), s. 30 (5).

(*h*) S. 95.

(*i*) S. 97 (3) (d).

(*k*) *Wookey* v. *Pole* (1820), 4 B. & Ald. 1; 22 R. R. 594; *Brandao* v. *Barnett* (1846), 12 Cl. & F. 787. The issue of exchequer bills is regulated by 29 & 30 Vict. c. 25, 40 & 41 Vict. c. 2, and 52 & 53 Vict. c. 6.

(*l*) For forms of these and similar instruments, see Jacobs, Bills of Exchange, pp. 16 *et seq.*

CHAPTER XI.

POLICIES OF INSURANCE.

§ 1. *In general.*

Chap. XI.

A POLICY of insurance is a contract by which the insurer undertakes to pay a sum of money to the assured on the happening of an event, or to indemnify him from the loss arising from the happening of the event.

Premium.

The consideration paid by the assured is called the premium, and is generally a sum of money paid down or payable annually until the event happens or the policy is allowed to lapse.

The practice of insuring against risks of loss or to cover liability for various contingencies has been vastly extended of recent years and has given rise to a great variety of policies of insurance which differ in some respects in their legal incidents according to the nature of the subject-matter of the insurance. Thus, policies of insurance may be effected on life, against maritime risks, fire, accident, sickness, burglary, and so on.

The most important classes of policies are those on life, against maritime risks, and against fire.

Duty of assured to disclose material facts.

It is the duty of a person seeking to effect a policy of any nature to communicate to the insurer every material fact in his knowledge, and, if he does not do so, the policy may be avoided by the insurer (*a*). If any wilful misrepresentation of a material fact is made by the assured, the insurer may avoid the policy (*b*).

Wilful misrepresentation.

The question whether a policy is liable to be avoided

(*a*) *Blackburn* v. *Vigors* (1887), 12 A. C. 531; *Lindenau* v. *Desborough* (1828), 8 B. & C. 586; *London Assurance* v. *Mansel* (1879), 11 Ch. D. 363.

(*b*) *Fitzherbert* v. *Mather* (1785), 1 T. R. 12; 1 R. R. 134. *Glicksman* v. *Lancs. & General Assurance Co.* (1925), 159 L. T. 566.

by a misstatement made by the assured of a material fact, which though untrue, is not untrue to his knowledge, is one of some nicety, and probably must receive different answers in the cases of policies on life and policies of marine insurance respectively (*c*).

Innocent misstatement.

Where the policy is on life, if it is a term of the contract that the statement is true, the policy is voidable if the statement is false (*d*). This is in accordance with the general rule as to avoiding contracts (*e*). On the other hand, any material misstatement, though innocent, renders a policy of marine insurance voidable, even where there is no express stipulation to that effect (*f*).

Material facts.

Whatever is necessary and essential to enable the insurer to determine what is the extent of the risk against which he undertakes to insure, is a material fact (*g*).

Public policy.

An insurance upon the property of an alien enemy during the continuance of war is void as being contrary to public policy (*h*).

§ 2. *Life Insurance.*

A policy on life contains a contract by the insurer (almost invariably a company) to pay a sum of money on the death of a specified person (*i*). The consideration is generally the payment of an annual sum, called the premium, during the life assured; but occasionally the premiums are only payable during a certain number of years if the assured should so long live, and sometimes,

Premium.

(*c*) Crawley, Life Insurance, pp. 129—131.

(*d*) *Anderson* v. *Fitzgerald* (1853), 4 H. L. C. 484; *Macdonald* v. *Law Union Co.* (1874), L. R. 9 Q. B. 328; *Hambrough* v. *Mutual Co.* (1895), 72 L. T. 140; *Biggar* v. *Rock Co.*, [1902] 1 K. B. 516; *Yorke* v. *Yorkshire Insurance Co.*, [1918] 1 K. B. 662.

(*e*) Salmond and Winfield on Contracts, 255.

(*f*) *Anderson* v. *Pacific Insurance Co.* (1872), L. R. 7 C. P. 68; *Macdowall* v. *Frazer* (1799), 1 Dougl. 260; *London General Insurance Co.* v. *General Marine Underwriters' Association*, [1921] 1 K. B. 104.

(*g*) Marine Insurance Act, 1906, s. 18 (2). See also s. 18 (3). *Bates* v. *Hewitt* (1867), L. R. 2 Q. B. 605, per Cockburn, C.J.

(*h*) See *Janson* v. *Driefontein Co.*, [1902] A. C. 484.

(*i*) *Dalby* v. *India Assurance Co.* (1854), 15 C. B. 387; 2 Sm. L. C. (ed. 13) 246.

Bonus.

instead of premiums, a sum of money is paid down. Sometimes the policy provides that on the occurrence of certain events the company will pay a share of the profits made by the company to the policy-holder either immediately on the happening of the event or on the death of the person assured; this sum of money is called a "bonus." Sometimes it is provided that instead of the bonus being paid it shall be applied in reduction of the subsequent premiums.

14 Geo. 3, c. 48.

It being found that the making insurances on lives, or other events, wherein the assured had no interest, introduced a "mischievous kind of gaming," in 1774 the statute 14 Geo. 3, c. 48, was passed.

Insurable interest.

By this Act all insurances (*k*) made upon lives or events in which the assured has no interest (*l*), or by way of gaming or wagering (*m*), are void; the name of the person interested therein must be inserted in the policy (*n*); and no greater sum can be recovered from the insurer than the value of the interest of the assured at the time when the policy was effected (*o*). The Act does not prevent persons effecting *bonâ fide* insurances upon their own lives (*p*). It is not necessary for the assignee of a policy to have any interest in the life assured (*q*).

Where a policy is void for want of insurable interest, the premiums paid cannot be recovered from the insurer (*r*), unless both parties are not *in pari delicto*; for instance, where the assured has been induced to effect the insurance by fraud, duress, or oppression (*s*).

(*k*) This Act does not apply to marine insurances: s. 4. See 28 Geo. 3, c. 56, repealed as to marine insurances by 6 Edw. 7, c. 41.

(*l*) *Halford* v. *Kymer* (1830), 10 B. & C. 724; 34 R. R. 553; *Hebdon* v. *West* (1863), 3 B. & S. 579; *Barnes* v. *London Co.*, [1892] 1 Q. B. 864; *Harse* v. *Pearl Co.*, [1904] 1 K. B. 558.

(*m*) See *Carlill* v. *Carbolic Co.*, [1893] 1 Q. B. 256; and the notes to *Godsall* v. *Boldero* (1807), 2 Sm. L. C. (ed. 13) 255 *et seq.*

(*n*) 14 Geo. 3, c. 48, s. 2.

(*o*) *Dalby* v. *India Co.*, *sup.*

(*p*) See *Wainwright* v. *Bland* (1835), 1 M. & W. 32; 46 R. R. 262.

(*q*) *Ashley* v. *Ashley* (1832), 3 Sim. 149; 38 R. R. 139.

(*r*) *Howard* v. *Refuge Society* (1886), 54 L. T. 644.

(*s*) *Harse* v. *Pearl Co.*, *sup.*; *Hughes* v. *Liverpool Victoria Legal Friendly Society*, [1916] 2 K. B. 482.

By "interest" in the Act is meant pecuniary interest (*t*). But every man is presumed to have a pecuniary interest in his own life, and therefore, when an executor sues on a policy effected on the life of and by his testator, he is not bound to show what reason the testator had for making the insurance (*u*). And a policy may be effected on A.'s life by B., in trust for A., if both names appear in the policy (*x*).

A creditor has an insurable interest in his debtor's life to the amount of his debt, and the policy remains valid though the debt may be paid off in the debtor's lifetime (*y*).

A husband has an insurable interest in the life of his wife (*z*), and a wife in the life of her husband (*a*); a surety in the life of his principal (*b*); and one of two joint obligors in a bond in the life of the other (*c*).

A creditor can only recover the amount of his insurable interest in his debtor's life, and accordingly if he effects several policies, the recovery on one policy is *pro tanto* a bar to recovery on the others (*d*).

Suicide.

If the assured dies by the hands of justice (*e*), or if he commits *felo de se* (*f*), the policy is absolutely void, but this is not the case if he commits suicide while of unsound mind (*g*); but when the policy contains a condition that it shall be void if the person whose life is assured commits suicide, it is void if he commits suicide while of unsound mind (*h*).

Death by felony.

The personal representatives of a man who has

(*t*) *Halford* v. *Kymer*, *sup.*
(*u*) *Wainwright* v. *Bland*, *sup.*
(*x*) *Collett* v. *Morrison* (1851), 9 Hare, 176.
(*y*) *Dalby* v. *India Assurance Co.*, *sup.*
(*z*) *Griffiths* v. *Fleming*, [1909] 1 K. B. 805.
(*a*) *Reed* v. *Royal Exchange* (1796), Peake, Add. Cas. 70.
(*b*) *Lea* v. *Hinton* (1854), 5 De G. M. & G. 823.
(*c*) *Branford* v. *Saunders* (1877), 25 W. R. 650.
(*d*) *Hebdon* v. *West* (1863), 3 B. & S. 579.
(*e*) *Amicable Society* v. *Bolland* (1830), 4 Bli. (N.S.) 194.
(*f*) Per Lord Mansfield, *Tyne* v. *Fletcher* (1777), Cowp. 669.
(*g*) *Horn* v. *Anglo-Australian Co.* (1861), 7 Jur. (N.S.) 673; 30 L. J. Ch. 511.
(*h*) *Clift* v. *Schwabe* (1846), 3 C. B. 437; *White* v. *British Empire Co.* (1868), 7 Eq. 394.

insured his life for the benefit of his wife can recover on the policy although the death has been caused by the felonious act of the wife; in such case the money will belong to the estate, and will not be held upon trust for the wife (*i*).

Lien for premiums.

Sometimes a stranger to, or part owner of, a policy, who pays the premiums necessary to keep up the policy, acquires a lien on the policy or its proceeds for the amount so paid, but this cannot be enforced actively in the absence of a contract or trust (*k*).

Assignment of policy.

A policy of life insurance is a chose in action, and therefore it was formerly assignable in equity only; it is now assignable at law, so that the assignee can sue in his own name (*l*).

Married Women's Property Act, 1882.

Under the Married Women's Property Act, 1882 (*m*), a married woman may, by virtue of the power of making contracts therein conferred upon her, effect a policy upon her own life, or the life of her husband, for her separate use. The Act (*m*) also contains a provision enabling a husband or wife to effect a policy on his or her own life by way of settlement for the benefit of the wife, or husband, or children of the assured. If the policy is for the benefit of wife *and* children, it seems that they all take as joint owners (*n*). The assured may by the policy, or by any memorandum under his or her hand, appoint trustees, and make provision for the appointment of new trustees, and for the investment of the moneys payable under any such policy.

§ 3. *Marine Insurance* (*o*).

Marine Insurance Act, 1906.

The law relating to marine insurance is now codified

(*i*) *Cleaver* v. *Mutual Assoc.*, [1892] 1 Q. B. 147.

(*k*) *Re Leslie* (1883), 23 Ch. D. 552; *Falcke* v. *Scottish Co.* (1886), 34 Ch. D. 234; *Re Winchelsea* (1888), 39 Ch. D. 168.

(*l*) 30 & 31 Vict. c. 144 (Policies of Assurance Act, 1867).

(*m*) S. 11. See *Griffiths* v. *Fleming*, [1909] 1 K. B. 805; *Re Parker*, [1906] 1 Ch. 526.

(*n*) *Re Seyton* (1886), 34 Ch. D. 511; *Re Davies*, [1892] 1 Ch. 90; *Re Browne*, [1903] 1 Ch. 188; *Re Griffiths*, [1903] 1 Ch. 739.

(*o*) See Arnould on Marine Insurance; 1 Maude & Pollock, 438 *et seq.*

The contract.

by the Marine Insurance Act, 1906 (*p*). The insurers are generally called underwriters, owing to the practice of their subscribing their names to the policy. A contract of marine insurance is one by which the insurer, in consideration of a premium, undertakes to indemnify the assured, in the manner and to the extent agreed, against losses incident to marine adventure (*q*); and every lawful marine adventure may be the subject of such a contract (*r*).

Premium.

Where the premium, or additional premium, is not fixed, but is to be such as may be arranged, and an arrangement is not made, a reasonable premium is payable (*s*). Unless otherwise agreed, the duty to pay the premium and the duty to issue the policy are concurrent conditions, and the insurer is not bound to issue the policy until payment or tender of the premium (*t*).

Return of premium.

The whole or part of the premium may be returnable, either in pursuance of a stipulation in the policy, or because of a total failure of consideration or a failure of an apportionable part of the consideration (*u*). In such a case the assured may recover the premium from the insurer, or retain it if not already paid (*x*).

Maritime adventure and perils.

There is a maritime adventure when a ship, goods, freight, or security for advances, are exposed to, or liability to a third party may be incurred by reason of, maritime perils (*y*). "Maritime perils" means perils of the seas (*z*), fire, war, pirates, rovers, thieves, captures, seizures, restraints and detainment of princes

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(*p*) 6 Edw. 7, c. 41.

(*q*) S. 1. See *Moore* v. *Evans*, [1918] A. C. 185.

(*r*) S. 3 (1).

(*s*) S. 31.

(*t*) S. 52.

(*u*) Ss. 83, 84. S. 84 (3) gives several examples of cases in which the premium is or is not returnable.

(*x*) S. 82.

(*y*) S. 3 (2).

(*z*) "Perils of the seas" is defined in Rule 7 of the Schedule to the Act of 1906 (see Appendix). It includes only fortuitous accidents or casualties of the seas. It does not extend to the ordinary action of the winds and waves. See *Sassoon* v. *Western Assurance Co.*, [1912] A. C. 561; *Mountain* v. *Whittle*, [1921] 1 A. C. 615; *Samuel* v. *Dumas*, [1924] A. C. 431.

and peoples, jettisons, barratry (*a*), and other like perils (*aa*).

Gaming or wagering policies.

Every contract of marine insurance by way of gaming or wagering is void (*b*); and it is deemed to be such a contract where the assured has not, and the contract is entered into with no expectation of acquiring, an insurable interest, or where the policy is made "interest or no interest" or "without further proof of interest than the policy itself" (known as a *p.p.i.* policy) or "without benefit of salvage to the insurer" (*c*). A person has an insurable interest who is interested in a marine adventure (*d*), for instance, where he stands in any legal or equitable relation to the adventure, or to any insurable property at risk therein, in consequence of which he may benefit by the safety or be prejudiced by the loss or detention of insurable property (*e*). The interest must exist at the time of the loss, though it need not exist at the time when the insurance is effected (*f*); but, if the insurance is "lost or not lost," the assured may recover though he may not have acquired his interest until after the loss, unless at time of effecting the insurance he knew of the loss and the insurer did not (*g*). Where the assured has no interest at the time of the loss, he cannot acquire an interest by any act or election after he knows of the loss (*h*).

P.p.i.

Insurable interest.

Interest of assured.

Instances.

In particular, the statute provides that there is an insurable interest in the following cases:—A defea-

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(*a*) Barratry is every species of fraud or knavery committed by the master or crew to the prejudice of the assured. See *Earle* v. *Rowcroft* (1806), 8 East, 134; 9 R. R. 385.

(*aa*) See note (*y*), *ante*.

(*b*) S. 4 (1). These provisions are substituted for those of 19 Geo. 2, c. 37, which is repealed.

(*c*) S. 4 (2). See *Cheshire & Co.* v. *Vaughan & Co.*, [1920] 3 K. B. 240.

(*d*) S. 5 (1).

(*e*) S. 5 (2). See *Lucena* v. *Crawford* (1808), 2 B. & P. N. R. 269; 6 R. R. 623; *Moran* v. *Uzielli*, [1905] 2 K. B. 555.

(*f*) S. 6 (1). *Rhind* v. *Wilkinson* (1810), 2 Taunt. 237; 11 R. R. 551; *Lower Rhine Assoc.* v. *Sedgwick*, [1899] 1 Q. B. 179.

(*g*) S. 6 (1). *Sutherland* v. *Pratt* (1843), 11 M. & W. 296.

(*h*) S. 6 (2).

sible (*i*), contingent (*i*), or partial interest (*k*), is insurable. An insurer can reinsure (*l*). The lender of money on bottomry or *respondentia*, in respect of the loan (*m*), the master and crew of a ship, in respect of wages (*n*), a person who pays freight in advance in so far as the freight is not repayable in case of loss, all have an insurable interest (*o*).

"Honour" policies.

The Act of 1906 declares all wager policies without exception to be void. Such policies are called "honour" policies (*p*).

Criminal offence to effect gambling policies.

For the purpose of preventing the making of these "honour policies," the Marine Insurance Act, 1909 (*q*), was passed, which makes it a criminal offence, (1) for any person to effect a contract of marine insurance unless he has an interest in the thing insured or an expectation of acquiring such an interest, and (2) for any person *in the employment of the owner of a ship, not being a part owner*, to effect a contract of marine insurance in relation to the ship, which is made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any like term.

Quantum of interest; mortgagor and mortgagee; insurance on behalf of others interested.

When the subject-matter insured is mortgaged, the mortgagor has an insurable interest in the full value, and the mortgagee in respect of the amount payable under the mortgage (*r*). A mortgagee, consignee, or other person having an interest in the property insured may insure on behalf and for the benefit of other persons interested as well as for his own benefit (*s*). The owner has an insurable interest in respect of the

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(*i*) S. 7.
(*k*) S. 8.
(*l*) S. 9.
(*m*) S. 10.
(*n*) S. 11.
(*o*) S. 12.
(*p*) See *Roddick* v. *Indemnity Co.*, [1895] 2 Q. B. 380; Arnould, sects. 311 *et seq.*
(*q*) 9 Edw. 7, c. 12.
(*r*) Act of 1906, s. 14 (1).
(*s*) S. 14 (2). See *Boston Co.* v. *British Ins. Co.*, [1906] A. C. 336.

full value of the property, although some third person is liable to indemnify him in case of loss (*t*).

Assignment of property insured.

If the assured assigns or parts with his interest in the property insured, he does not thereby transfer to the assignee his rights under the policy, unless there be an express or implied agreement to that effect (*u*), except where there is a transmission of interest by operation of law (*x*). The policy itself may always be assigned, unless it contains terms expressly prohibiting assignment; and the assignee of the beneficial interest may sue thereon in his own name (*y*). But defences available against the assignor may be set up against the assignee (*z*). It may be assigned by indorsement or in other customary manner (*a*); and either before or after loss (*b*). Where, however, the assured has lost or parted with all his interest in the thing insured, he cannot assign the policy except in pursuance of a previous agreement to assign (*c*).

Assignment of policy.

Value insured.

A contract of marine insurance is a contract by the insurers, or "underwriters," to indemnify the assured (*d*). But this statement must be taken with the qualification that the parties may agree, in the policy, in estimating the value of the thing insured, so that on a total loss the assured is entitled to receive that amount, be it more or less than the true value of the thing (*e*). A policy in which the value of the thing insured is agreed and stated is a "valued" policy (*f*), and the value agreed upon is, in the absence of fraud, conclusive between the parties if the thing insured is totally or partially lost (*g*). A policy in

"Valued" policy.

"Open" policy.

(*t*) S. 14 (3). (*u*) S. 15. (*x*) S. 15.

(*y*) S. 50.

(*z*) *Pickersgill* v. *London and Provincial Insurance Co.*, [1912] 3 K. B. 614.

(*a*) S. 50 (3).

(*b*) S. 50 (1).

(*c*) S. 51.

(*d*) S. 1.

(*e*) S. 16. *Irving* v. *Manning* (1847), 1 H. L. C. 307.

(*f*) S. 27.

(*g*) S. 27 (3). *Forbes* v. *Aspinall* (1811), 13 East, 326; *The Main*, [1894] P. 320.

which the value is not stated is an "open" or "unvalued" policy, and in case of loss the value must be proved (*h*); the Act of 1906 contains rules for ascertaining that value (*i*). There is a third kind of policy which is called a "floating policy" (*k*). It is a policy which describes the insurance in general terms, and leaves the name of the ship and other particulars to be defined by subsequent declaration (*k*).

"Floating policy."

Indemnity.

A marine policy is a contract of indemnity; and "the general rule of law is that, where there is a contract of indemnity (it matters not whether it is a marine policy, or a policy against fire on land, or any other contract of indemnity) and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and, if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back" (*l*). The contract "means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance" (*m*). If, therefore, the assured has effected several policies on the same ship or cargo, he cannot recover in all more than the amount of his loss, or the "valued" amount, as the case may be (*n*). He can proceed on any one of the policies and leave the insurer who pays to recover contribution from the other insurers (*o*).

Double insurance.

(*h*) S. 28.
(*i*) S. 16.
(*k*) S. 29.
(*l*) *Burnand* v. *Rodocanachi* (1881), 7 App. Cas. 333, per Lord Blackburn, p. 339.
(*m*) *Castellain* v. *Preston* (1883), 11 Q. B. D. 386, per Brett, L.J.
(*n*) S. 32. *Irving* v. *Richardson* (1831), 1 M. & Rob. 153; 36 R. R. 541; *North of England Co.* v. *Armstrong* (1870), L. R. 5 Q. B. 244.
(*o*) S. 80. *Newby* v. *Reed* (1763), 1 W. Bl. 416.

Conclusion of contract.

The "slip."

The contract is deemed to be concluded when the insurer accepts the proposal of the assured, whether the policy is then issued or not; and, for the purpose of showing when the proposal was accepted, reference may be made to the "slip" or covering note, which is a memorandum of an intended policy, initialled by the underwriters (*p*).

Form and contents of policy;

Stamp Act, 1891;

The Stamp Act, 1891, enacts that a "contract for sea insurance shall not be valid unless expressed in a policy of sea insurance," and that a policy of sea insurance shall not be valid unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, and is made for a period not exceeding twelve months (*q*).

Marine Insurance Act, 1906;

differences between the two Acts.

The Act of 1906 provides that a "contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act" (*r*), and that "a marine policy must specify" the name of the assured or his agent, the subject-matter and the risk, the voyage or period of time, or both, the amount insured, and the names of the insurers (*s*). It would seem that these two enactments do not cover quite the same ground; and any insurance which comes within the former Act will be void for non-compliance with its requirements, while any insurance which does not come within the former Act, but does come within the latter Act, will only be "inadmissible in evidence" if it does not comply with its requirements. It is expressly provided that the Act of 1906 shall not affect the provisions of the Act of 1891 (*t*).

"Voyage" and "time" policies.

Where the contract is to insure the thing "at and from," or from one place to another, the policy is called

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(*p*) Ss. 21, 89. See *Lishman* v. *Maritime Co.* (1874), L. R. 10 C. P. 179.

(*q*) 54 & 55 Vict. c. 39, ss. 91-97. *Home Co.* v. *Smith*, [1898] 2 Q. B. 351; *Genforsikrings, &c.* v. *Da Costa*, [1911] 1 K. B. 137.

(*r*) S. 22.

(*s*) S. 23.

(*t*) S. 91 (1).

a "voyage policy" (*u*); and if for a definite period of time, it is called a "time policy" (*u*). A contract for both voyage and time may be included in the same policy (*x*), as, for instance, "from Dover to Calais and back for a year," which is called a "mixed policy" (*x*). A time policy made for more than one year is invalid; but a "continuation clause" may be inserted (*y*). A "continuation clause" is defined in sect. 11 (4) of the Finance Act, 1901, as "an agreement to the following or the like effect, namely, that in the event of the ship being at sea or the voyage otherwise not completed on the expiration of the policy, the subject-matter of the insurance shall be held covered until the arrival of the ship, or for a reasonable time thereafter not exceeding thirty days."

Continuation clause.

The voyage.

In the case of a policy for a voyage "at and from" or "from" a particular place, it is not necessary that the ship should be at that place when the contract is concluded, but it is an implied condition that the adventure shall commence within a reasonable time, and that, if it does not so commence, the insurer may avoid the contract (*z*). If the place of departure (*a*) or the destination (*b*) is specified, and the vessel sails from some other place or for some other destination, the risk does not attach. When, after the commencement of the risk, the voyage is changed (*c*), or there is a deviation (*d*) without lawful excuse (*e*), the insurer is discharged from liability from the time of the change or deviation; and if the adventure is not prosecuted throughout with reasonable despatch, and there is no lawful excuse (*e*), the insurer is discharged from the time when the delay became unreasonable (*f*).

Change of voyage.

Deviation.

Delay.

(*u*) S. 25 (1). (*x*) S. 25 (1).

(*y*) S. 25 (2). Stamp Act, 1891, s. 93; Finance Act, 1901, s. 11. See *Royal Exchange Assur. Corp.* v. *Sjoforsakrings*, [1902] 2 K. B. 384.

(*z*) S. 42. *Lavabre* v. *Wilson* (1779), 1 Doug. 291.

(*a*) S. 43. (*b*) S. 44. (*c*) S. 45. (*d*) Ss. 46, 47.

(*e*) S. 49.

(*f*) S. 48. *Palmer* v. *Marshall* (1832), 8 Bing. 317; *Maritime Co.* v. *Stearns*, [1901] 2 K. B. 912.

If the insurance is for a particular voyage, the risk does not attach until that voyage is commenced (*g*); if it is "from" a port, the risk does not attach until the ship sails, but if it is "at and from" the ship is protected while in the port (*h*). If the voyage is to a country generally, it terminates on the arrival at any port in that country; if to a named port, it terminates on the mooring of the ship at the port in the usual place for the discharge of cargo (*i*). In the case of a time policy the risk attaches from the time mentioned in the policy.

"Warranty."

The term "warranty," as used with reference to marine insurance, bears a meaning different from that which it bears in a contract for sale (*k*). In a marine policy "warranty" means an undertaking by the assured that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or an affirmation or denial of the existence of a particular state of facts (*l*). It may be either express or implied (*m*); and it is a condition which must be exactly complied with, otherwise the insurer is discharged from liability (*n*).

Sea-worthiness.

In a voyage policy, but not in a time policy, there is an implied warranty that the vessel shall be seaworthy at the commencement of the risk (*o*); and, in the case of a time policy, the insurer is not liable for any loss attributable to unseaworthiness, if with the privity of the assured the ship is sent to sea in an unsea-

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(*g*) *Simon* v. *Sedgwick*, [1893] 1 Q. B. 303.

(*h*) *Haughton* v. *Empire Co.* (1865), L. R. 1 Ex. 206; *The Copernicus*, [1896] P. 237; *Hydarnes Co.* v. *Indemnity Co.*, [1895] 1 Q. B. 500.

(*i*) *Stone* v. *Marine Co.* (1875), 1 Ex. D. 81; *Camden* v. *Cowley* (1763), 1 W. Bl. 417.

(*k*) *Ante*, p. 85.

(*l*) S. 33 (1), ss. 34-41. See notes to *Dixon* v. *Sadler* (1839), and *Woolridge* v. *Boydell* (1778), Tudor's L. C. Merc. Law, 136.

(*m*) Ss. 33 (2), 35.

(*n*) S. 33 (3). As to return of premiums where the insurer is not liable, see *Tyrie* v. *Fletcher* (1777), Tudor's L. C. Merc. Law, 265.

(*o*) Ss. 39, 40. *Greenock Co.* v. *Maritime Co.*, [1903] 2 K. B. 657.

worthy state (*p*). A ship is seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured (*q*).

Losses.

Unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but not for any loss which is not so proximately caused (*r*). He is not liable for any loss attributable to the wilful misconduct of the assured, but he is liable for loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew, unless the policy otherwise provides (*s*).

Partial loss.

Actual total loss.

A loss may be either total or partial (*t*). Any loss other than a total loss is a partial loss (*t*). A total loss may be either actual or constructive (*t*). An actual total loss is where the thing insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof (*u*).

Constructive total loss.

Abandonment.

A constructive total loss is where the thing insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred (*x*), or where there has been frustration of the adventure by reason of a peril insured against (*y*). In such a case the assured may either treat the loss as partial, or abandon the thing to the insurer and treat

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(*p*) S. 39 (5). *Gibson* v. *Small* (1853), 4 H. L. C. 353; *Dudgeon* v. *Pembroke* (1877), 2 App. Cas. 284; *Thompson* v. *Hopper* (1856), 6 E. & B. 172.

(*q*) S. 39 (4). *Hedley* v. *Pinkney*, [1892] 1 Q. B. 64; *Rathbone* v. *McIver*, [1903] 2 K. B. 378.

(*r*) S. 55. This section gives examples of losses for which the insurer is, and is not, liable.

(*s*) S. 55 (2) (a). See *Small* v. *United Kingdom Assoc.*, [1897] 2 Q. B. 311; *Trinder* v. *Thames Assoc.*, [1898] 2 Q. B. 114.

(*t*) S. 56.

(*u*) Ss. 57, 58, 59.

(*x*) S. 60, which gives examples. See *Blairmore Co.* v. *Macredy*, [1898] A. C. 593; *Angel* v. *Merchants' Co.*, [1903] 1 K. B. 811.

(*y*) *British and Foreign Marine Insurance Co.* v. *Sanday & Co.*, [1916] 1 A. C. 650. Cf. *Becker, Gray & Co.* v. *London Assurance Corporation*, [1916] 2 K. B. 156.

Notice.

the loss as an actual total loss (*z*). The assured must generally give notice of abandonment to the insurer when he elects to abandon the thing insured; otherwise the loss can only be treated as partial (*a*). Upon abandonment the insurer is entitled to all the interest and rights of the assured in the thing insured (*b*).

§ 4. *Fire Insurance.*

Policies of fire insurance.

Policies of fire insurance "are not, in the nature of them, assignable, nor intended to be assigned, from one person to another, without the consent of the office" (*c*), nor have they been made assignable by statute. But, by the Law of Property Act, 1925, on a sale or exchange, after 1925, of property insured, any money received under a policy maintained by the vendor in respect of damage to or destruction of property included in the contract shall be held by the vendor on behalf of the purchaser and payable to the latter on completion or thereafter when received. This applies only in the absence of contrary agreement and is subject to (a) the consent of the insurers, and (b) the payment by the purchaser of a proportionate part of the premium from the date of the contract (*d*).

Contracts of indemnity.

They are contracts of indemnity, the insurer engaging to make good, within certain limited amounts, the losses sustained by the assured in their buildings and effects (*e*). And it follows, as in other contracts of indemnity, that, upon payment of the amount of the loss, the insurer is entitled to be put in the place of the assured, and to succeed to all the ways and means by which the assured might have protected himself

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(*z*) S. 61.

(*a*) S. 62.

(*b*) S. 63. *The Red Sea*, [1896] P. 20.

(*c*) *Lynch* v. *Dalzell* (1729), 4 Bro. P. C. 431; quoted by Lord Hardwicke in *Sadlers' Co.* v. *Badcock* (1743), 2 Atk. 557.

(*d*) S. 47 (1) and (2). For previous law see *Rayner* v. *Preston* (1881), 18 Ch. D. 1.

(*e*) *Dalby* v. *India, &c. Assurance Co.* (1854), 15 C. B. 387, per Parke, B.

Subrogation.

against or reimbursed himself for the loss (*f*). He is entitled to the rights of the assured by what is termed "subrogation." Therefore, after a contract for sale of property insured under which the purchaser is not entitled to the benefit of the insurance, if the property is destroyed by fire, the vendor, if he is paid the full purchase-money without abatement, cannot also recover or retain the insurance money, for he has suffered no loss (*g*). And, as in all cases of insurance, whether on lives, ships, or other things, the insurer must be informed by the party effecting the insurance of all material facts affecting the subject-matter (*h*).

Insurable interest.

It is necessary that the party insuring should have an interest in the property at the time of insuring, and at the time the fire happens (*i*).

Re-instatement of property insured.

In 1774 the statute 14 Geo. 3, c. 78 (*k*), was passed, which, in case of fires within the City of London and certain other limits, enabled and required the insurers to expend the insurance money upon the property upon request by any person interested in the property or upon suspicion of arson. It has been held that these provisions are not confined to property within the places mentioned in the Act, but are of general application (*l*). This section does not apply to insurances of chattels (*m*).

(*f*) *Darrell* v. *Tibbitts* (1880), 5 Q. B. D. 560; per Cairns, L.C., *Simpson* v. *Thomson* (1877), 3 App. Cas. 284; *West of England Co.* v. *Isaacs*, [1897] 1 Q. B. 226; *Phœnix Co.* v. *Spooner*, [1905] 2 K. B. 753.

(*g*) *Castellain* v. *Preston* (1883), 11 Q. B. D. 380.

(*h*) *Lindenau* v. *Desborough* (1828), 8 B. & C. 586; *Condogianis* v. *Guardian Co.*, [1920] 2 A. C. 125.

(*i*) *Sadlers' Co.* v. *Badcock*, *sup.*; *Rayner* v. *Preston*, *sup.* And see 14 Geo. 5, c. 48, *ante*, p. 236.

(*k*) S. 83.

(*l*) *Ex p. Goreley* (1864), 4 De G. J. & S. 477; *Re Quicke's Trusts*, [1908] 1 Ch. 887; *Sinnott* v. *Bowden*, [1912] 2 Ch. 414. But see *Westminster Fire Office* v. *Glasgow, &c. Soc.* (1888), 13 App. Cas. 699.

(*m*) *Lees* v. *Whiteley* (1866), 2 Eq. 143.

CHAPTER XII.

TRADE MARKS AND TRADE NAMES.

§ 1. *Trade Marks.*

Chap. XII.

Principles.

The right to the exclusive use of a particular mark or name for purposes of trade rests on the fundamental rule "that one man has no right to put off his goods for sale as the goods of a rival trader, and he cannot, therefore, be allowed to use names, marks, letters, or other indicia by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person. A man may mark his own manufactures (or goods sold by him) either by his name, or by using for the purpose any symbol or emblem, however unmeaning in itself; and, if such symbol or emblem comes, by use, to be recognised in trade as the mark of the goods of a particular person, no other trader has a right to stamp it upon his goods of a similar description" (*a*). That is to say, no man is entitled to represent his goods as being the goods of another man (*b*).

If A. uses on his goods a mark already used by B. on goods of the same description, A. substantially represents the goods to be the manufacture of B., and so he deprives, or may deprive, B. of the profit which B. might have made by the sale of the goods which, *ex hypothesi*, the purchaser intended to buy from B. (*c*). A man has no right thus to appropriate the benefit of

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(*a*) Per Ld. Kingsdown, *Leather Cloth Co.* v. *American Leather Cloth Co.* (1863), 11 H. L. C. 538; *Reddaway* v. *Banham*, [1896] A. C. 199, 209; *Spicer Bros.* v. *Spalding and Hodge* (1915), 32 R. P. C. 52.

(*b*) Per James, L.J., *Singer Co.* v. *Loog* (1880), 18 Ch. D. 412.

(*c*) *Seixo* v. *Provezende* (1865), 1 Ch. 192; *Montgomery* v. *Thompson*, [1891] A. C. 217.

another's reputation. The principle is that, if by any mark, or words, or form of doing up things (*d*), goods are recognised in the trade as the goods of a particular person, the Court will protect him, that is to say, will restrain anyone from using the same mark or words, or form of doing up (*e*), so as to pass off the goods of the latter as the goods of the former.

What is a "Trade Mark."

A trade mark has been defined as follows (*f*) :—

> "A trade mark means the mark under which a particular individual trades, and which indicates the goods to be his goods—either goods manufactured by him, or goods selected by him (*g*), or goods which, in some way or other, pass through his hands in the course of trade. It is a mode of designating goods as being goods which have been, in some way or other, dealt with by A. B., the person who owns the trade mark."

And again, by the Trade Marks Act, 1905, as (*h*) :—

> "A mark used, or proposed to be used, upon, or in connection with, goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with, or offering for sale."

Trade mark denotes producer.

Using the word "producer" to mean the person who has made, or selected, or otherwise dealt with the goods, it may be observed that a trade mark denotes the producer and not the thing produced; that is to say, it distinguishes the goods from other goods of the same description produced by other persons: for the article to which it is applied may be one which all the world

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(*d*) The "get up" of the goods, as in *Siegert* v. *Findlater* (1878), 7 Ch. D. 801; *Birmingham Co.* v. *Powell*, [1897] A. C. 710; *Edge & Sons* v. *Niccolls & Sons*, [1911] A. C. 693; see Kerly, Trade Marks, 6th ed., 557, 601.

(*e*) *Waterman* v. *Ayres* (1888), 39 Ch. D. 36.

(*f*) *Re Australian Wine Importers* (1889), 41 Ch. D. 278, 280, per Kay, J.

(*g*) As to selectors, see *Hirsch* v. *Jonas* (1876), 3 Ch. D. 584, 586; *Robinson* v. *Finlay* (1887), 9 Ch. D. 487; *Re Wood's T. M.* (1886), 32 Ch. D. 262, per Fry, L.J. As to importers, see *Re Apollinaris Co.*, [1891] 2 Ch. 226, per Fry, L.J. The trade mark of the producer cannot be registered as the trade mark of an importer, unless he has a monopoly of the whole of the producer's goods: *Re Apollinaris Co.*, *sup.*

(*h*) 5 Edw. 7, c. 15, s. 3. *Major* v. *Franklin*, [1908] 1 K. B. 712.

can and may lawfully make and sell. And herein a trade mark differs from a mere descriptive trade name; for a name may denote either the maker of the particular article in question or the nature of the article, by whomsoever made, that is, it may be merely an advertisement of the character and quality of the article (*i*).

Descriptive words.

Therefore words in common use, merely descriptive of articles of a given kind, cannot be made trade marks; nor can words which simply define the nature, kind or quality of the article (*k*). A trade mark may consist of words (*l*), but they must be specific and distinctive in their meaning, that is, they must point to and distinguish the goods as being those of a particular producer and of no one else.

Word becoming *publici juris*.

But a word or words which originally constituted a trade mark, to the exclusive use of which a particular trader or his successors in trade may have been entitled, may subsequently become the denomination of the commodity itself, and no longer be a representation that the article is the manufacture of any particular person; as in the case of "Harvey's Sauce," which was originally the name of a sauce made by a particular individual, but became *publici juris*, that is to say, all the world were entitled to call the sauce they made "Harvey's Sauce," if they pleased (*m*). The test whether a word which was originally a trade mark has become *publici juris* has been said to be "whether the use of it by other persons is still calculated to deceive the public; whether

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(*i*) See *Leather Cloth Co.* v. *American Leather Cloth Co.* (1863), 11 H. L. C. 539, 546.

(*k*) *E.g.*, "Paraffin Oil": *Young* v. *Macrae* (1862), 9 Jur. (N.S.) 322; *Lever* v. *Goodwin* (1887), 36 Ch. D. 1 ("Self-washing" Soap); *Reddaway* v. *Banham*, [1896] A. C. 199; *Cellular Co.* v. *Maxton*, [1899] A. C. 326; *British Vacuum Co.* v. *New Vacuum Co.*, [1907] 2 Ch. 312 ("Vacuum Cleaner"); *Horlick's Malted Milk Co.* v. *Summerskill* (1916), 33 T. L. R. 83 ("Malted Milk"); *Cordes* v. *Addis & Son* (1923), 40 R. P. C. 133 ("Prophylactic" toothbrushes). See as to descriptive words, Kerly, T. M., 159 *et seq.*

(*l*) Subject to the effect of the Trade Marks Act, *post*, pp. 264-5.

(*m*) Per Mellish, L.J., *Ford* v. *Foster* (1872), 7 Ch. 628; *Reddaway* v. *Bentham Co.*, [1892] 2 Q. B. 639; *National Starch Co.* v. *Munn's Co.*, [1894] A. C. 275.

it may still have the effect of inducing the public to buy goods not made by the original owner of the trade mark as if they were his goods" (*m*). So, where an article has been patented, but the patent has expired, a proper name applied to the patented article may come to be the name of the article, and not a mark or sign indicating the manufacturer (*n*). It may have been usually applied to goods made by a particular person, not because they are of his make, but because he, as having taken out a patent, could alone make them (*o*); and he cannot prolong his monopoly by asserting an exclusive right to a trade mark in the name of the thing which was the subject of the patent (*p*). But the expiration of a patent does not entitle another person to imitate the "get up" of the article which was the subject of the patent, so as to produce a belief that his goods are those of the person who held the patent (*q*).

Expired patent.

But, though a person cannot claim the exclusive right to the use of a word which is, or has come to be, merely descriptive of the nature of the article, yet he can prevent others from using the name in such a way as to produce a belief that their goods are of his production (*r*).

Trade mark for natural products.

A trade mark may be used to denote not only

(*n*) As the "Singer" sewing machine: see *Singer Co.* v. *Wilson* (1875), 2 Ch. D. 434; 3 App. Cas. 376; *Singer Co.* v. *Loog* (1880), 18 Ch. D. 395; 8 App. Cas. 15.

(*o*) *Young* v. *Macrae* (1862), 9 Jur. (N.S.) 322; *Linoleum Co.* v. *Nairn* (1878), 7 Ch. D. 834; *Re Chesebrough*, [1902] 2 Ch. 1.

(*p*) *Wheeler and Wilson Co.* v. *Shakespear* (1870), 39 L. J. Ch. 36; *Cheavin* v. *Walker* (1876), 5 Ch. D. 850; *Re Ralph* (1883), 25 Ch. D. 194, 199.

(*q*) *Edge & Sons* v. *Niccolls & Sons*, [1911] A. C. 693.

(*r*) *Siegert* v. *Findlater* (1878), 7 Ch. D. 801 ("Angostura Bitters"); *Birmingham Co.* v. *Powell*, [1897] A. C. 710, 717; *Reddaway* v. *Banham*, [1896] A. C. 199, 210; *Parsons* v. *Gillespie*, [1898] A. C. 239; cp. *Montgomery* v. *Thompson*, [1891] A. C. 217 ("Stone Ale"), see per Ld. Macnaghten, at p. 225; *Eno* v. *Dunn* (1890), 15 App. Cas. 252 ("Fruit Salt"), see at pp. 260, 261, per Ld. Herschell, p. 263, per Lord Macnaghten; *Cellular Co.* v. *Maxton*, [1899] A. C. 326 ("Cellular Cloth"); *Society of Accountants* v. *Goodway*, [1907] 1 Ch. 489 (Incorporated accountant); *Goddard* v. *Watford Co-operative Society* (1924), 41 R. P. C. 218 ("Goddard's Plate Powder").

manufactured goods, but even a natural product (*e.g.*, a mineral water), where no person other than the owner of the trade mark has the means of procuring that product, so that the mark indicates him as the person who supplies it (*s*).

Trade mark must be affixed to goods.

A trade mark, properly so called, must be in some way attached to the article sold. It may be affixed to or impressed upon the goods themselves by means of a stamp or brand or adhesive label, or it may be made to accompany the goods by being impressed on or made to adhere to an envelope or case containing the goods, or it may be worked into the material or be some peculiar form of the material itself, as in a case where it consisted of a heading of certain coloured lines in the hem or fringe of cloth (*t*). In all these cases it is intended to show that the goods are produced or sold by some particular person. Here, again, a difference is to be noted between the use of a trade mark and that of a mere trade name not affixed to particular goods, in that the mark accompanies the goods into whosoever hands they come, whereas, if A. sells goods, calling them or invoicing them by a name which causes the immediate purchaser, C., to suppose them to be goods produced by B., but which is not affixed to the goods, it does not follow that persons who buy the goods from C. will also be deceived as to the origin of the goods.

Goods of same description.

Further, the right of a trade mark exists only in connection with the particular species of manufacture or vendible commodity to which it has been applied by the person asserting the right (*u*). If he has used it, for example, only on carriages, that would not prevent a manufacturer of woollen goods from putting it as a trade mark upon woollen goods (*x*) for " there is no exclusive ownership of the symbols which constitute a trade mark

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(*s*) Sebastian on T. M., 4; *Re Apollinaris Co.*, [1891] 2 Ch. 186.

(*t*) See *Singer Co.* v. *Wilson* (1874), 2 Ch. D. 441; and *Mitchell* v. *Henry* (1880), 15 Ch. D. 181.

(*u*) *Ainsworth* v. *Walmisley* (1866), 1 Eq. 518.

(*x*) *Singer Co.* v. *Wilson*, *sup.*

apart from the use or application of them" (*y*); "a trade mark consists in the exclusive right to the use of some name or symbol as applied to a particular manufacture or vendible commodity" (*z*), and consequently the use of the same mark in connection with a different article is not an infringement of such right.

Names of persons as trade marks.

The name of a person or firm may be a trade mark; but the right to the exclusive use of such a mark exists only as against persons bearing a different name, and cannot be maintained as against a person or firm bearing the same name and using it *bonâ fide* without fraud for trade purposes (*a*). But it is otherwise if he uses his own name with such additions as to deceive the public into the belief that his wares are those of another trader (*b*). The test has been said to be whether he uses the name honestly and fairly in the ordinary prosecution of his business, or dishonestly, to palm off his own commodity as the production of another (*c*).

Function of a trade mark.

The function of a trade mark may be regarded as two-fold, for it not only serves to secure to the producer the custom of persons who desire to purchase his goods, but it also indicates to a purchaser that he may take it as a guarantee that the goods came from the particular producer whose goods he desires to obtain (*d*), and the protection of the public from imposition is recognised as one of the objects of trade mark law.

(*y*) Per Ld. Westbury, C., *Leather Cloth Co.* v. *American Co.* (1863), 4 De G. J. & S. 142; *Somerville* v. *Schembri* (1887), 12 App. Cas. 453.

(*z*) Per Ld. Westbury, C., *Hall* v. *Barrows* (1863), 4 De G. J. & S. 150, 158; *Ainsworth* v. *Walmisley* (1866), 1 Eq. 518.

(*a*) *Burgess* v. *Burgess* (1853), 3 De G. M. & G. 896; *Turton* v. *Turton* (1889), 42 Ch. D. 128; *Tussaud* v. *Tussaud* (1890), 44 Ch. D. 678; *Saunders* v. *Sun Co.*, [1894] 1 Ch. 537; *Valentine's Meat Juice* v. *Valentine Extract* (1900), 48 W. R. 127; *Fine Cotton Spinners, Lim.* v. *Harwood*, [1907] 2 Ch. 184; *Dunlop Pneumatic Tyre Co.* v. *Dunlop Motor Co.*, [1907] A. C. 430; *Warwick Tyre Co.* v. *New Motor Co.*, [1910] 1 Ch. 248; Kerly, T. M., 562 *et seq.*; *post*, p. 269.

(*b*) *Holloway* v. *Holloway* (1850), 13 Beav. 209; *John Brinsmead & Sons, Lim.* v. *Brinsmead*, [1913] 1 Ch. 492.

(*c*) See *J. W. Goddard* (trading as J. Goddard & Sons) v. *Hyam and J. Goddard* (1918), 35 R. P. C. 21 ("Goddard's Non-mercurial Plate Powder").

(*d*) *Massam* v. *Thorley's Cattle Food Co.* (1880), 14 Ch. D. 748, 755.

Whether "property" in a trade mark.

It was at one time said that there cannot be property in a trade mark, and that the ground of the jurisdiction, both at law and in equity, was the fraud of the defendant (*e*). It is true that there cannot be said to be an absolute kind of property in a trade mark (*f*), for, as we have before observed, there is no exclusive right to the mark universally in the abstract, *i.e.*, apart from its use in connection with a particular species of goods. But the *dicta* which are to be found in the cases, to the effect that there is no property in a trade mark, must be understood to mean no more than this (*g*); and it has been laid down that "the true principle would seem to be that the jurisdiction of the Court" (by which the jurisdiction in equity appears to be intended) "in the protection given to trade marks rests upon property" (*h*); that the right to a trade mark, being one which is protected by the Court, and which may be bought and sold, is, in that sense of the word, "property" (*i*).

Lord Blackburn (*k*) treats it as having been established, before the Trade Marks Act of 1875, that when a person had used a mark on his goods, so as to distinguish them from the goods of any other person, he had a property in that mark to such an extent as to entitle him to an injunction to prevent any other person from continuing to use on other goods (of a similar kind) a mark so similar to his mark as in fact to mislead the public into taking them for those of the person who owned the mark; that this was on the ground that the right to use the mark was his property, and that there-

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(*e*) Ld. Langdale, in *Perry* v. *Truefitt* (1842), 6 Beav. 66; Wood, V.-C., in *Collins* v. *Brown* (1857), 3 K. & J. 423.

(*f*) Wood, V.-C., in *Farina* v. *Silverlock* (1855), 1 K. & J. 515.

(*g*) Ld. Westbury, C., in *Hall* v. *Barrows* (1863), 4 De G. J. & S. 150, 158.

(*h*) Ld. Westbury, C., *Leather Cloth Co.* v. *American Co.* (1863), 4 De G. J. & S. 137, 142. See per Ld. Cranworth, in S. C., 11 H. L. C. 523, 533, 534.

(*i*) Wood, V.-C., in *Ainsworth* v. *Walmisley* (1866), 1 Eq. 518.

(*k*) *Orr-Ewing* v. *Registrar of T. M.* (1879), 4 App. Cas. 479, 494; but see per Ld. Herschell, *Reddaway* v. *Banham*, [1896] A. C. 199, 209.

fore it was not necessary for the purpose of prevention (*i.e.*, in order to obtain an injunction) to prove fraud or an intention to mislead. "I think," he said (*l*), "that at least from the time of *Millington* v. *Fox* (*m*), decided by Cottenham, L.C., in 1838, to *Wotherspoon* v. *Currie* (*n*), decided by this House in 1872, it has been considered that, for the purpose of preventing infringement, the exclusive right to use a trade mark was a right of property."

Lord Cairns pointed out that there are many cases in which a trade mark has been used not merely improperly, but fraudulently, and where this fraudulent use has been adverted to and made the ground of decision; "but," said his lordship, "I wish to state in the most distinct manner that, in my opinion, fraud is not necessary to be averred or proved in order to obtain protection for a trade mark. . . . A man may take the trade mark of another ignorantly, not knowing it was the trade mark of the other; or he may take it in the belief, mistaken, but sincerely entertained, that in the manner in which he is taking it he is within the law and doing nothing which the law forbids; or he may take it knowing it is the trade mark of his neighbour, and intending and desiring to injure his neighour by so doing. But in all these cases it is the same act that is done, and in all these cases the injury to the plaintiff is just the same. The action of the Court must depend on the right of the plaintiff and the injury done to that right. What the motive of the defendant may be, the Court has very imperfect means of knowing. If he was ignorant of the plaintiff's rights in the first instance, he is, as soon as he becomes acquainted with them and perseveres in infringing upon them, as culpable as if he had originally known them" (*o*).

(*l*) *Orr-Ewing* v. *Registrar of T. M.*, *sup.*, at p. 494.

(*m*) (1838), 3 My. & Cr. 338; 45 R. R. 271. See the remarks of Cotton, L.J., on this case in *Proctor* v. *Bayley* (1889), 42 Ch. D. 400.

(*n*) (1872), L. R. 5 H. L. 508.

(*o*) *Singer Co.* v. *Wilson* (1877), 3 App. Cas. 376, 391, and see per Ld. O'Hagan, *ib.* 396, and the judgment (cited *ib.* 392, by

It was remarked by Wood, V.-C. (*p*), that, though the Court would grant an injunction where no evil intent could be attributed to the defendant, yet even in such a case the ground of the interference is still fraud, because, while a Court of law might think a defendant not liable to an action for an act done *absente animo malo*, a Court of equity may, quite consistently with this, hold that, if he continue to do the act, he will commit a fraud, and therefore in reality the jurisdiction does rest on the equity of preventing one person from committing a fraud on another.

Distinction between law and equity.

It must, however, be observed that though, for purposes of equitable relief by way of injunction, the question whether the defendant had any intention, by using the mark, to pass off his goods as those of the plaintiff (*q*), or even whether he knew that he was using a mark which belonged to the plaintiff, is immaterial (*r*), yet in an action at law for damages the plaintiff must prove fraud, or at least knowledge on the part of the defendant (*s*), and in equity, if he asks for an account of profits or for damages, he can obtain this relief only in respect of user continued by the defendant after he became aware of the plaintiff's rights (*t*), or at least knew that the trade mark was not his own, though he may not have known to whom it belonged (*u*).

Account of profits—damages.

In equity a plaintiff may elect between having an account of profits (*x*), or damages (*y*). At law, in order

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Ld. Cairns) of Wood, V.-C., in *Welch* v. *Knott* (1857), 4 K. & J. 747. And see per Bacon, V.-C., in *Singer Co.* v. *Loog* (1880), 18 Ch. D. 403.

(*p*) *Leather Co.* v. *American Leather Co.* (1863), 1 H. & M. 287.

(*q*) *Somerville* v. *Schembri* (1887), 12 App. Cas. 453; *Reddaway* v. *Bentham*, [1892] 2 Q. B. 639.

(*r*) See per Jessel, M.R., *Singer Co.* v. *Wilson* (1875), 2 Ch. D. 442.

(*s*) See per Ld. Blackburn, *Singer Co.* v. *Loog* (1882), 8 App. Cas. 29-32; see per James, L.J., in *Mitchell* v. *Henry* (1880), 15 Ch. D. 181, 191; *Reddaway* v. *Bentham Co.*, [1892] 2 Q. B. 639; *Bourne* v. *Swan*, [1903] 1 Ch. 211.

(*t*) *Edelsten* v. *Edelsten* (1863), 1 De G. J. & S. 185, 199, per Ld. Westbury, C.; *Slazenger* v. *Spalding*, [1910] 1 Ch. 257. See *Cartier* v. *Carlile* (1862), 31 Beav. 292; *Moet* v. *Couston* (1864), 33 Beav. 578.

(*u*) Kerly, T. M., 518.

(*x*) See *Ford* v. *Foster* (1872), 7 Ch. 611; *Harrison* v. *Taylor* (1865), 11 Jur. (N.S.) 408; 12 L. T. 339.

(*y*) The damages will be merely nominal in absence of proof of to obtain substantial damages, it was necessary to prove that an injury had been actually done; in equity, so far as the right to an injunction is concerned, it is sufficient to show that the defendant threatens to do, and will, if not prevented, do that injury (*z*); and it becomes a mere question of fact whether that which the defendant is doing is reasonably likely to cause his goods to be mistaken for the plaintiff's manufacture. It is not necessary for the plaintiff to give evidence of deception in fact, *i.e.*, to prove instances in which customers have purchased the defendant's goods in the belief that they were produced by the plaintiff (*a*), though, in practice, such evidence is generally relied on as a proof of the probability of mistakes.

Deception of ultimate purchaser.

The question in trade mark cases is whether the ultimate purchaser is likely to be misled by the acts of which the plaintiff complains; and it is no defence to show that the immediate purchaser would not be misled; for "no man, however honest his personal intentions, has a right to adopt and use so much of his rival's established trade mark as will enable any dishonest trader into whose hands his goods may come to sell them as the goods of his rival" (*b*). The question is whether the defendant has put into the hands of others the means of deceiving the ultimate purchasers (*c*). Even if the maker of the goods expressly tells the immediate purchaser that they are of his own manufacture, that will not save him from an injunction if they are sold with the plaintiff's trade mark attached to them, and in such a case all the plaintiff has to do is to show that his trade mark has been taken, that is, that the defendant has used an essential portion of the plaintiff's trade mark

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actual damage: Kerly, T. M., 514. As to proof of actual damage, see *Leather Co.* v. *Hirschfeld* (1865), 1 Eq. 299.

(*z*) Per Ld. Blackburn, *Singer Co.* v. *Loog*, *sup.*

(*a*) *Johnston* v. *Orr-Ewing* (1882), 7 App. Cas. 219; *Edelsten* v. *Edelsten* (1863), 1 De G. J. & S. 200; *Hookham* v. *Pottage* (1872), 8 Ch. 91.

(*b*) Ld. Watson, in *Johnston* v. *Orr-Ewing*, *sup.*, at p. 232.

(*c*) James, L.J., *Singer Co.* v. *Loog* (1880), 18 Ch. D. 412; Chitty, J., *Lever* v. *Goodwin* (1887), 36 Ch. D. 3.

upon goods of a similar description (*d*). It is not necessary to show that the mark used by the defendant is absolutely identical with that of the plaintiff; it is sufficient if it is so like it that unwary or ignorant purchasers (*e*) would probably be misled. It is no answer to say that the purchasers were incautious, for "the loss to the plaintiff of the custom of an incautious purchaser is as great a damage as the loss of that of a cautious one" (*f*).

The Trade Marks Act.

The principles of trade mark law were established before and are independent of any statutes, but we have now to consider the scope and effect of the modern legislation, embodied originally in the Trade Marks Registration Act, 1875, which, together with amending Acts of 1876 and 1877, was repealed and replaced by the Patents, Designs and Trade Marks Act, 1883, as amended by the Act of 1888. The last-mentioned Acts have now been repealed and replaced by the Trade Marks Act, 1905 (*g*), as amended by the Trade Marks Acts, 1914 and 1919 (*h*).

Object of the Acts.

The objects of these enactments (*i*) appear to be :—(1) To place restrictions on the bringing of actions for infringement of trade marks, by requiring that a trade mark shall be registered before any such action can be brought; (2) to facilitate evidence of title to trade marks by means of registration; and (3) to define the symbols or devices which the law will recognise as trade marks; and to protect the public by cutting down the numerous forms of words and other things by the use of which traders tried to secure to themselves exclusive rights; for, after the passing of the Act of 1875, certain things only could be registered, subject to this, that if a right

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(*d*) Per Jessel, M.R., *Singer Co.* v. *Wilson* (1875), 2 Ch. D. 442, 443.

(*e*) *Ford* v. *Foster* (1872), 7 Ch. 627.

(*f*) Per Ld. Blackburn, *Johnston* v. *Orr-Ewing* (1882), 7 App. Cas. 229. See *Singer Co.* v. *Loog* (1882), 8 *id.* 15, 18, 20; see Cotton, L.J., in S. C. (1880), 18 Ch. D. 395, 422.

(*g*) 5 Edw. 7, c. 15.

(*h*) 4 & 5 Geo. 5, c. 16; 9 & 10 Geo. 5, c. 79.

(*i*) See *Edwards* v. *Dennis* (1885), 30 Ch. D. 464, 470; *Re Van Duzer* (1887), 34 Ch. D. 623, 634.

had been acquired by user before that date to a particular device or form of words as a trade mark, then it might be registered under the Act, although it did not come within the definition of what could otherwise be registered as a trade mark under the Act (*k*).

Effect of the Acts.

It has been suggested that the effect of the Acts may be to give the registered proprietor of a trade mark a right so absolute that he may maintain an action to prevent another person from selling goods with that mark upon them without reference to the question whether or no the goods are sold under such circumstances as to pass them off as the goods of the plaintiff; but Cotton, L.J., while declining to express an opinion on that point, laid it down that the principles on which the Court proceeds are not altered by the Acts (*l*), which (speaking generally) do not give new rights (*m*). Since the Acts, as before, the plaintiff, assuming that he has title under them, "is bound to show, either that the defendant has taken the whole or a substantial portion of his trade mark, or that the defendant has used his, the plaintiff's, trade mark in such a manner as to lead the public to believe that his, the defendant's, goods are the plaintiff's (*n*). The Act of 1875, it has been said, was intended to effect a great and fundamental change in the law, viz., that whereas before that Act the property in any trade mark could be obtained only by user, or, in the case of cutlery goods, by an assignment by the Cutlers' Company (see *post*, p. 269), under the Act a mode of acquiring a right in a trade mark was given mainly by registration; and accordingly the Act enabled a person who had invented a trade mark, which had not been previously used by some other person, to obtain registration of it and to treat its being on the register as evidence of public user or equivalent to public user, and so the Act gave a new title to the exclusive

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(*k*) See *post*, p. 265, as to "old" marks.

(*l*) *Mitchell* v. *Henry* (1880), 15 Ch. D. 193.

(*m*) *Re Lyndon* (1886), 32 Ch. D. 117.

(*n*) Per Fry, L.J., *Edwards* v. *Dennis* (1885), 30 Ch. D. 478.

use of a trade mark (*o*). It is now established, after some doubts had been expressed on this point (*p*), that a mark may be registered, though there has been no such user of it as to give a right independently of the Acts (*q*). But a person cannot be allowed to register a trade mark, and thus preclude all other persons from using it, without ever using it himself or intending to use it (*r*). Nor will registration of a mark be allowed which would have the effect of preventing the public, on the expiration of a patent, from having the full use of the invention (*s*).

It has now been decided that registration under the Acts does not operate as notice to all persons of the right of the registered proprietor of a trade mark (*t*).

The Trade Marks Act, 1875.

The scheme of the Act of 1875 (which is in substance that of the Acts now in force) was as follows. It established a register of trade marks (*u*) and their proprietors, and then made registration in pursuance of the Act a condition precedent to the right to institute proceedings to prevent, or recover damages for, infringement, except in the case of trade marks in use before August 13, 1875, as to which it was provided that no such proceedings should be instituted until and unless registration had been made or refused (*w*). A trade mark was required to be registered "as belonging to particular goods or classes of goods" (*x*), and, for the purposes of the Act, was defined as consisting of certain "essential particulars" (*y*).

(*o*) Per Fry, L.J., *Re Hudson* (1886), 32 Ch. D. 325, 326.

(*p*) See *Edwards* v. *Dennis* (1885), 30 Ch. D. 473, 479.

(*q*) *Re Hudson* (1886), 32 Ch. D. 311, 318. And cp. s. 3 of the Act of 1905, which speaks of a mark "used or proposed to be used."

(*r*) *Batt* v. *Dunnett*, [1899] A. C. 428; per Fry, L.J., *Re Apollinaris Co.*, [1891] 2 Ch. 186, 234.

(*s*) *Re Moore's Modern Methods, Lim.'s Application* (1919), 36 R. P. C. 6.

(*t*) *Slazenger* v. *Spalding*, [1910] 1 Ch. 257.

(*u*) "Not generally, but of trade marks as defined by the Act": per Ld. Cairns, C., *Orr-Ewing* v. *Registrar of T. M.* (1879), 4 App. Cas. 479, 483.

(*w*) 38 & 39 Vict. c. 91, s. 1, as amended by 39 & 40 Vict. c. 33, s. 1; Kerly, T. M., 392 *et seq.*

(*x*) S. 2.

(*y*) S. 10.

Trade Marks Acts, 1905-1919.

The law as to registration of trade marks is now contained in the Trade Marks Acts, 1905-1919 (*z*). The Board of Trade has power to make general rules for regulating the practice of registration under the Acts (*a*). Under this provision the rules now in force are the Trade Mark Rules, 1920 (*b*).

Registration.

Registration (*c*) is to be obtained by an application to the Comptroller-General of Patents, Designs and Trade Marks, who is called for this purpose the Registrar, in writing in the prescribed manner and at the prescribed place (*d*). For the purposes of registration, goods are classified in the manner appearing in the third schedule to the Rules of 1920 (*e*), and registration must be applied for in respect of particular goods or classes of goods (*f*).

Trade Marks Act, 1919.

By the Trade Marks Act, 1919 (*g*), the Register of Trade Marks is divided into two parts, A. and B.

Part A. of the register is to comprise (i) all marks entered in the register at the commencement of the Act (April 1, 1920) and (ii) all marks which after that date may be registered under the provisions of the Act of 1905.

Part B. is to comprise (i) all trade marks registered under this part of the Act, and (ii) all trade marks entered on or removed thereto under the provisions of the Act (sect. 1).

Application may be made by the person claiming to be the proprietor of the mark for registration in Part B., where any mark has been, for not less than two years used in the United Kingdom in connection with his goods (sect. 2). The effect of registration in Part B. is to give a more limited protection to the proprietor of the trade mark than in the case of registration in Part A.

" The registration of a person as the proprietor of a trade mark in Part B. of the register shall be *primâ*

(*z*) 5 Edw. 7, c. 15; 4 & 5 Geo. 5, c. 16; 9 & 10 Geo. 5, c. 79.

(*a*) Act of 1905, s. 60.

(*b*) See Kerly, T. M., App. iv.

(*c*) Ss. 12-18.

(*d*) S. 12; Trade Marks Rules, 1920, r. 18; as to metal goods (Sheffield marks), see *post*, p. 269.

(*e*) Rule 5.

(*f*) S. 8.

(*g*) 9 & 10 Geo. 5, c. 79.

facie evidence that that person has the exclusive right to the use of that trade mark, but, in any action for infringement of a trade mark entered in Part B. of the register, no injunction, interdict or other relief shall be granted to the owner of the trade mark in respect of such registration, if the defendant establishes to the satisfaction of the Court that the user of which the plaintiff complains is not calculated to deceive or to lead to the belief that the goods the subject of such user were goods, manufactured, selected, certified, dealt with or offered for sale by the proprietor of the trade mark " (sect. 4).

Trusts.

No notice of any trust shall be entered in the register or be receivable by the registrar (*h*).

Definitions.

A " mark " includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof (*i*). A " trade mark " means a mark used or proposed to be used upon or in connection with goods for the purpose of indicating that they are the goods of the proprietor of the trade mark by virtue of manufacture, selection, certification, dealing with, or offering for sale (*k*). A " registrable trade mark " is one which is capable of registration under the Act (*i*).

What marks may be registered;

A registrable trade mark must contain or consist of at least one of the following essential particulars (*l*) :—

names;

(1) The name of a company, individual, or firm, represented in a special or particular manner;

signatures;

(2) The signature of the applicant for registration or some predecessor in his business (*m*);

words;

(3) An invented word or words (*n*);

(*h*) Act of 1905, s. 5.

(*i*) S. 3.

(*k*) S. 3. See *ante*, p. 251.

(*l*) S. 9.

(*m*) *Re A. Baker & Co.*, [1908] 2 Ch. 86, 103. There was no provision for the registration of the signature of a predecessor in business in the previous Acts.

(*n*) An invented word need not be absolutely new: *Re Linotype Co.*, [1900] 2 Ch. 238. It must not, however, be a mere variation of an existing English word: *Christy* v. *Tipper*, [1905] 1 Ch. 1 (Absorbine); or in the nature of an abbreviation of the name of the firm: *Eisman & Co.'s Application* (1920), 37 R. P. C. 134 (" Eanco " refused); or a name spelt backwards: *Cording's Application*, [1916] 1 Ch. 422 (" Gnidroc "). It need not be the invention

(4) A word or words having no direct reference to the character or quality of the goods, and not being, according to its ordinary signification, a geographical name, or a surname (*o*);

devices, &c.

(5) Any other distinctive mark, but a name (*p*), signature or word or words other than such as fall within the description in the above paragraphs, shall not be registrable except upon evidence of its distinctiveness (*q*).

"Distinctive."

"Distinctive" means capable of distinguishing the goods of the proprietor of the trade mark from those of other persons (*r*). In the case of a trade mark in actual use, how far actual user has rendered it distinctive for the particular goods with respect to which it is registered, or proposed to be registered, may be taken into consideration (*s*). The limitation of a trade mark in whole or in part to one or more specified colours is to be taken into consideration in deciding on its distinctive character (*t*).

Colours.

Old marks.

An old mark, that is, "any special or distinctive word or words, letter, numeral, or combination of letters or numerals, used as a trade mark by the applicant or his predecessors in business" before August 13, 1875, which has continued to be used (either in its original form or with additions, or alterations not substantially affecting its identity) down to the date of the application for registration, is registrable as a trade mark (*u*),

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of the applicant: *Re Holt & Co.*, [1896] 1 Ch. 711 (Trilby). See on the clause generally, *Re Eastman Co.*, [1898] A. C. 571 ("Solio" for photographic printing paper held registrable as an invented word).

(*o*) *Re Magnolia Metal Co.*, [1897] 2 Ch. 371; *Re Price's Candle Co.*, [1907] 2 Ch. 435 (Motorine—held to be registrable); *Philippart* v. *Whiteley*, [1908] 2 Ch. 274 (Diabolo—removed from register).

(*p*) *Re Pope's Electric Co.*, [1911] 2 Ch. 382.

(*q*) S. 9 (5), as amended by s. 7 of Act of 1919.

(*r*) Act of 1919, s. 2 (2). *Re Davis's Trade Marks*, [1927] 2 Ch. 345.

(*s*) S. 9. *Re Joseph Crosfield, Lim.*, [1910] 1 Ch. 141; *Re Gramophone Co.*, [1910] 2 Ch. 423.

(*t*) S. 10. It had been held under the previous Acts that distinctiveness must be independent of colour: *Re Hanson's Trade Mark* (1887), 37 Ch. D. 112.

(*u*) Act of 1905, s. 9.

though not possessing the essential particulars necessary for a new mark. The purpose of this provision is to preserve vested rights which had been acquired by user before the Act of 1875 (*x*). But the mark must have been used alone, and not in combination with other words or with any device (*y*).

Mark calculated to deceive;

It is unlawful to register as a trade mark or part of a trade mark any matter, the use of which would, by reason of being calculated to deceive or otherwise, be disentitled to protection in a Court of justice, or would be contrary to law or morality, or any scandalous design (*z*). "Calculated to deceive" means not only designed to deceive, but likely in fact to deceive (*a*). The onus of proving that a trade mark is not calculated to deceive lies upon the applicant (*b*).

or scandalous.

Disclaimers.

If a trade mark contains parts not separately registered by the proprietor as trade marks, or matters common to the trade (*c*), or otherwise non-distinctive, it may be made a condition of its being entered upon or remaining on the register that the proprietor disclaim the exclusive use of any part or parts of the trade mark, or of all or any portion of such matter, or make such other disclaimer as may be considered needful for defining his rights under the registration (*d*).

Essential particulars.

Where, therefore, it has to be determined whether a given mark constitutes a trade mark capable of registration as such under the Act, the first inquiry necessary is whether some one, or more than one, of the essential

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(*x*) *Orr-Ewing* v. *Registrar of T. M.* (1879), 4 App. Cas. 495.

(*y*) *Perry-Davis* v. *Harbord* (1890), 15 App. Cas. 316, 321; *Richards* v. *Butcher*, [1891] 2 Ch. 522.

(*z*) S. 11. *Eno* v. *Dunn* (1890), 15 App. Cas. 252; *Re Australian Wine Importers* (1889), 41 Ch. D. 278; *Re Royal Worcester Co.*, [1909] 1 Ch. 459 (use of the word "Royal").

(*a*) *Re Lyndon's Trade Marks* (1886), 32 Ch. D. 109, 119, 121; *Re Price's Candle Co.*, [1907] 2 Ch. 435, 444; *Re A. Baker & Co.*, [1908] 2 Ch. 86; *Re Van der Leeuw*, [1912] 1 Ch. 40.

(*b*) *Eno* v. *Dunn*, *sup.*; *Re A. Baker & Co.*, *sup.*; *Re Price's Candle Co.*, *sup.*

(*c*) See *Burland* v. *Broxburn Co.* (1889), 42 Ch. D. 274.

(*d*) S. 15 of Act of 1905; see *Re A. Baker & Co.*, [1908] 2 Ch. 86; and cp. *Re Smokeless Powder Co.*, [1892] 1 Ch. 590; *Re Clement*, [1900] 1 Ch. 114; *Re Faulder*, [1902] 1 Ch. 125.

particulars of a trade mark, as defined by the Act, is found to exist, so that the mark may be described with the one, or more than one, essential particular or particulars which distinguish it (*e*).

Refusal of registration.

If the registrar refuses registration or imposes conditions, he must, if required by the applicant, state in writing the grounds and materials on which he has arrived at his decision; and except by leave no further grounds of objection beyond this statement are allowed to be taken on appeal (*f*). An appeal lies to the Board of Trade, or to the Court, at the option of the applicant (*g*).

Appeal.

Transfer of trade marks.

A trade mark, when registered, can be assigned and transmitted only in connection with the goodwill of the business concerned in the goods for which it has been registered, and is determinable with that goodwill (*h*). If the goodwill of a person does not pass to one successor, but is divided, the registrar may permit an apportionment of the registered trade marks of that person among the persons continuing the business (*i*). The business must be co-extensive with the goods in respect of which the mark is registered; and the assignee has no exclusive right unless the business assigned is co-extensive with the mark as registered (*k*).

Registration; renewal.

The registration of a trade mark lasts for fourteen years (*l*), but may be renewed for a like period from time to time at the expiration of the last registration (*m*).

(*e*) Per Ld. Cairns, C., *Orr-Ewing* v. *Registrar of T. M.* (1879), 4 App. Cas. 479, 484.

(*f*) S. 12 (2), (3), (5). As to discretion of Registrar, see s. 53, and *Eno* v. *Dunn* (1890), 15 App. Cas. 252; *Re Birmingham Co.*, [1907] 2 Ch. 396.

(*g*) S. 12 (4). Appeals from decisions of the Registrar on opposed applications are to the Court only (s. 14, amended by s. 8 of Act of 1919).

(*h*) S. 22. See *Re Wellcome* (1886), 32 Ch. D. 213; *Re Magnolia Metal Co.*, [1897] 2 Ch. 371; *Ullman* v. *Cesar Leuba*, [1908] A. C. 443; *Lecouturier* v. *Rey*, [1910] A. C. 262.

(*i*) S. 23.

(*k*) See *Edwards* v. *Dennis* (1885), 30 Ch. D. 454, 479, per Fry, L.J.

(*l*) S. 28.

(*m*) Ss. 29-31.

Registration of assignees, &c.

A person who has become entitled to a registered trade mark by assignment, transmission, or other operation of law, may be registered as the proprietor of the mark (*n*).

Non-user of trade mark.

A registered trade mark may by order of the Court be removed from the register upon the ground that there was no *bonâ fide* intention to use it, and that in fact there has been no *bonâ fide* user of it, or that it has not been *bonâ fide* used during the five years before the application (*o*).

Effect of registration.

Right to assign.

Equities.

Rights of proprietor.

The person for the time being entered in the register as proprietor of a trade mark has, subject to any other vested rights appearing on the register, power to assign the mark; but any equities in respect of the mark may be enforced in like manner as in respect of any other personal property (*p*). He has also, if the trade mark is valid, the exclusive right to use it upon or in connection with the goods in respect of which it is registered (*q*).

Registration is evidence of validity.

In all legal proceedings registration is *primâ facie* evidence of the validity of the original registration of a trade mark, and of all subsequent assignments and transmissions (*r*); and the original registration, after the expiration of seven years from its date, must be taken to be valid in all respects, unless obtained by fraud or offending against the provisions of sect. 11 (*s*) of the Act (*t*).

The proprietor of a registered mark cannot, however, prevent any person from using a similar mark for goods in respect of which that person or his predecessors has continually used the mark from a date anterior to the user by the registered proprietor of his mark (*u*).

Registration a condition precedent to suing for infringement.

No legal proceedings can be taken to protect an unregistered trade mark, unless it was used before

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(*n*) S. 33. See *Ex p. New Ormonde Co.*, [1896] 2 Ch. 520.
(*o*) S. 37. See *Re Ducker's Trade Mark*, [1929] 1 Ch. 113.
(*p*) S. 38; see s. 33.
(*q*) S. 39.
(*r*) S. 40.
(*s*) *Ante*, p. 266
(*t*) S. 41.
(*u*) S. 41.

August 13, 1875, and has been refused registration under the Act of 1905 (*x*); and a certificate of such refusal may be obtained from the registrar (*x*). The result is that the owner of a trade mark suing to prevent, or to recover damages for, infringement must be able to produce a certificate of registration, if the mark is capable of registration, or in the case of an old mark a certificate of refusal of registration.

Name.

Registration cannot interfere with the *bonâ fide* use by another of his own name or place of business, or that of his predecessors, or of any *bonâ fide* description of the character or quality of his goods (*y*).

Sheffield marks.

Special provision is made by the Act of 1905 (*z*) for the registration at Sheffield by the Cutlers' Company, in a register to be called the Sheffield Register, of trade marks used on "metal goods" (which are defined as meaning all metals whether wrought, unwrought, or partly wrought, and all goods composed wholly or partly of any metal) by any person carrying on business in Hallamshire, in the County of York, or within six miles thereof (*a*).

Cotton marks.

There is also a special register at Manchester for trade marks for cotton goods (*b*). It is to be noticed that in regard to cotton piece goods and cotton yarn a mark consisting of a word or words alone, whether invented or otherwise, and in respect of cotton piece goods a line heading alone, cannot now be registered, and is not to be deemed distinctive; and no registration of a cotton mark can give any exclusive right to the use of any word, letter, numeral, line heading, or any combination thereof (*c*).

International and colonial arrangements for protection of trade marks.

Where an arrangement has been made by the Crown

(*x*) S. 42.

(*y*) S. 44. *Re Joseph Crosfield, Lim.*, [1910] 1 Ch. 130, 146.

(*z*) S. 63.

(*a*) See as to Sheffield marks, Kerly, T. M., Ch. VI., and T. M. Rules, 1920, rr. 104-109; and as to the "Cutlers' Company's Acts," Kerly, T. M., Ch. VI.

(*b*) S. 64. See Kerly, T. M., Ch. VII., and T. M. Rules, 1920, rr. 110-121.

(*c*) S. 64 (10).

with a foreign State for mutual protection of trade marks, and an Order in Council to such effect is in force, any person who has applied for protection for any trade mark in any such State is entitled to registration of his trade mark under the Patents, Designs, and Trade Marks Acts in priority to other applicants; and such registration is to have the same date as the date of application in such foreign State (*d*); but the application must be made within six months from his applying for protection in the foreign State (*e*). The proprietor of the trade mark will not be entitled to recover damages for infringements happening before the actual registration of his trade mark in this country (*d*). The prior use during such period in the United Kingdom or the Isle of Man of the trade mark will not invalidate the registration of the trade mark (*f*). The application for the registration of a trade mark is to be made in the ordinary manner, except that any trade mark, the registration of which has been duly applied for in the country of origin, may be registered (*g*).

The above provisions may be applied by an Order in Council to any " British possession " (*i.e.*, any territory or place situate within His Majesty's dominions other than Great Britain, Northern Ireland, the Isle of Man, and Channel Islands), the Legislature of which has made satisfactory provision for the protection of inventions, designs, and trade marks, patented or registered in this country (*h*).

Offences under the Act of 1905; false entries; falsely representing mark to be registered.

Making false entries or writings falsely purporting to be copies of entries in the register, is a misdemeanour (*i*). Falsely representing a trade mark as registered is an offence punishable on summary conviction (*k*). The

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(*d*) S. 103 (1) of the Patents, Designs and Trade Marks Act, 1883, amended by 48 & 49 Vict. c. 63, s. 6. The provisions of this section and s. 104 are made applicable to the Act of 1905 by s. 65.

(*e*) Patents and Designs (Convention) Act, 1928, s. 4.

(*f*) S. 103 (2).

(*g*) S. 103 (3). See *Re Californian Fig Syrup Co.* (1888), 40 Ch. D. 620; *Re Carter Medicine Co.*, [1892] 3 Ch. 472.

(*h*) S. 104.

(*i*) Act of 1905, s. 66.

(*k*) S. 67.

unauthorised user of the Royal Arms, or arms so closely resembling the same as to be calculated to deceive, in connection with any trade, business, calling, or profession, may be restrained by injunction (*l*).

Use of Royal Arms.

Merchandise Marks Acts.

It should be added that under the Merchandise Marks Act, 1862 (*m*), the forgery of a trade mark was made a misdemeanour. This Act was repealed by the Merchandise Marks Act, 1887 (*n*), which makes it a punishable offence to forge or falsely apply to goods a registered trade mark; or to apply to goods any trade description (*o*) which is materially false (*p*) as to the number, quality, measure, gauge (*q*), or weight (*r*), or as to the place or country in which they were produced, or as to their mode of manufacture, or material, or as to their being the subject of an existing patent, privilege or copyright, or as to the person or firm who manufactured them; falsifying a genuine trade mark, by alteration, addition, effacement, or otherwise, is a forgery of it. It is also an offence against the Act to sell goods to which a forged trade mark is applied, unless the seller, having taken reasonable precautions, has no reason to suspect its genuineness or has otherwise acted innocently (*s*).

§ 2. *Trade Name.*

Trade name.

There is no right by English law to the exclusive use of a name apart from its use in connection with a trade or business (*t*); but the law recognises a plaintiff's right

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(*l*) S. 68. *Royal Warrant Holders Assoc.* v. *Deane*, [1912] 1 Ch. 10.

(*m*) 25 & 26 Vict. c. 88.

(*n*) 50 & 51 Vict. c. 28, amended by 54 Vict. c. 15. See also Merchandise Marks Act, 1926, which contains elaborate provisions for securing that imported goods shall bear a notice indicating their origin, unless exempted by the Board of Trade.

(*o*) *Cameron* v. *Wiggins*, [1901] 1 K. B. 1.

(*p*) *Starey* v. *Chilworth Gunpowder Co.* (1889), 24 Q. B. D. 90; *Kirschenboim* v. *Salmon*, [1898] 2 Q. B. 19.

(*q*) See *Budd* v. *Lucas*, [1891] 1 Q. B. 408.

(*r*) *Langley* v. *Bombay Tea Co.*, [1900] 2 Q. B. 460.

(*s*) S. 2 (2). *Christie* v. *Cooper*, [1900] 2 Q. B. 522.

(*t*) *Du Boulay* v. *Du Boulay* (1869), L. R. 2 P. C. 430.

to prevent others from personating his business by using any such description as would lead customers to suppose they were trading with the plaintiff (*u*); and this rests on the principle, which is the ground of the law as to trade marks (*x*), viz., that one man will not be allowed to pass off his goods as those of a rival trader, and thus to obtain the benefit of his rival's reputation and of custom intended for his rival. This principle applies equally to the use of a name which has been so appropriated by user as to come to mean the goods of a particular producer, though it has never been impressed on or affixed to goods and is not a trade mark properly so called (*y*).

A "trade name" may be that of a person, or firm (*z*), or company (*a*), or that of the establishment at which the trade is carried on (*b*); or it may be a name under which goods are known in the market as being made or sold by a particular person, firm, or company (*c*); and a man has a right to prevent other persons from using a name, real or fictitious, or a description, whether true or not, which is calculated to represent, *i.e.*, which has the effect, whether intended or not (*d*), of representing to the world that the goods produced by A. are goods produced by B., on the ground that B., having established a business reputation under a particular name, has a right to prevent anyone else from injuring his business by using that name (*e*).

(*u*) Per Giffard, V.-C., *Boulnois* v. *Peake* (1880), 13 Ch. D. 513, n.

(*x*) See *Levy* v. *Walker* (1879), 10 Ch. D. 436; *Goodfellow* v. *Prince* (1886), 35 Ch. D. 9; *Grand Hotel* v. *Wilson*, [1904] A. C. 103.

(*y*) *Singer Co.* v. *Loog* (1882), 8 App. Cas. 15, 32, per Lord Blackburn.

(*z*) *Levy* v. *Walker*, *sup.*

(*a*) *Saunders* v. *Sun Co.*, [1894] 1 Ch. 537; *North Cheshire, &c. Co.* v. *Manchester Brewery Co.*, [1899] A. C. 83; *Société Anonyme* v. *Panhard Co.*, [1901] 2 Ch. 513.

(*b*) *E.g.*, "The Carriage Bazaar," *Boulnois* v. *Peake*, *sup.*; and see *Civil Service Supply Association* v. *Dean* (1880), 13 Ch. D. 512.

(*c*) As "Singer Sewing Machines," *Singer Co.* v. *Loog*, *sup.*; *Grezier and Doyle* v. *Antran* (1896), 13 R. P. C. 13 ("Chartreuse"); *Birmingham Vinegar Co.* v. *Powell*, [1897] A. C. 710.

(*d*) *Singer Co.* v. *Loog*, *sup.*, per Lord Watson, at p. 38.

(*e*) *Levy* v. *Walker*, *sup.*; *Société Anonyme* v. *Panhard Co.*, [1901] 2 Ch. 513; see *Lecouturier* v. *Rey*, [1910] A. C. 262. *Ante*, pp. 250-1.

In cases of trade name, as in those of trade marks (*f*), the right to relief has been sometimes rested on the ground of fraud in the defendant; but it seems to be settled that the plaintiff need not allege the defendant's act in using the name to be fraudulent, or even that he knew of the plaintiff's right to its use (*g*), but only that the use by the defendant is such as to be reasonably likely to cause the defendant's goods to be taken for those of the plaintiff (*h*), and that the plaintiff need not prove that any customer has in fact been deceived (*i*). "All the Court requires is to be satisfied that the names are so similar as to be calculated to produce confusion between the two—so calculated to do it that when it is drawn to the attention of those adopting the name complained of that that would be the result, it would not be honest for them to persevere in their intention, though originally the intention might not have been otherwise than honest" (*k*). If the natural consequence of the use by the defendant of the name adopted by him is that his goods will be taken to be those of the plaintiff, and he continues that user after notice of the plaintiff's right to the name, the Court holds the user to be wrongful and in a certain sense "fraudulent" (*l*).

Use of a man's own name.

It should be added that a man has a right to trade under his own name, even though the effect may be to injure a rival trader who happens to bear the same name (*m*), provided he does so *bonâ fide*; but he must not use his own name in such a manner as to represent

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(*f*) *Ante*, pp. 256-8.

(*g*) *Ainsworth* v. *Walmisley* (1865), 1 Eq. 524 (unless plaintiff claims damages); *Turton* v. *Turton* (1889), 42 Ch. D. 128, 138, per Lord Esher, M.R. See *ante*, pp. 257-260.

(*h*) That it is a mere question of fact and not of the defendant's intention, see *Hookham* v. *Pottage* (1872), 8 Ch. 91; *Singer Co.* v. *Wilson* (1877), 3 App. Cas. 376, 396; *Singer Co.* v. *Loog*, *sup.*, per Lord Watson, at p. 38.

(*i*) *North Cheshire Co.* v. *Manchester Brewery Co.*, *sup.*

(*k*) Per James, L.J., *Hendriks* v. *Montagu* (1881), 17 Ch. D. 638.

(*l*) *Singer Co.* v. *Loog*, *sup.*, per Cotton, L.J.; *Turton* v. *Turton*, *sup.*, per Cotton, L.J.

(*m*) *Fine Cotton Spinners' Assoc.* v. *Harwood*, [1907] 2 Ch. 184; *Warwick Tyre Co.* v. *New Motor Co.*, [1910] 1 Ch. 248. See *ante*, p. 255.

Chap. XII. that his business is that of a rival trader of the same name (*n*).

Whether the right to the exclusive use of a trade name can be properly called " property " appears to be still a moot point (*o*); but it is perhaps rather a matter of verbal nicety than of practical importance, the substantial ground of the jurisdiction and the principles on which the Court acts being well ascertained (*p*).

(*n*) *Fullwood* v. *Fullwood*, 9 Ch. D. 176.

(*o*) See per Lord Blackburn, in *Singer Co.* v. *Loog*, *sup.* See also Wood, V.-C., in *Ainsworth* v. *Walmisley*, *sup.*; James, L.J., in *Singer Co.* v. *Loog*, *sup.*

(*p*) See per Lord Herschell, in *Montgomery* v. *Thompson*, [1891] A. C. 217, and in *Reddaway* v. *Banham*, [1896] A. C. 209. See *ante*, p. 256.

CHAPTER XIII.

PATENTS.

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Letters patent.

THE term "Letters Patent" (*a*) in the widest sense denotes grants made by the Crown of some right or privilege, as, for example, grants of lands, titles of honour, or offices; *e.g.*, the office of one of His Majesty's counsel.

But by "Patents" in modern times we generally understand grants by the Crown to inventors of the sole and exclusive right to "use, exercise, and vend" their inventions within the United Kingdom and the Isle of Man.

Monopolies.

In ancient times the Crown asserted a prerogative right to make grants of monopolies. Coke describes a monopoly as being "an institution or allowance by the King by his grant, commission, or otherwise, to any person or persons, bodies politique or corporate, of or for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politique or corporate are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade" (*b*). But, at common law, no grant of a monopoly was valid in respect of articles in common use, or if it purported to give the sole right to exercise a

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(*a*) *I.e.*, *Literæ Patentes*, open letters, so-called, says Blackstone (2 Bl. 346), because "they are not sealed up but exposed to open view with the great seal pendant at the bottom, and are usually directed or addressed by the King to all his subjects at large." See the Form of Letters Patent for Inventions, *post*, Appendix. By 46 & 47 Vict. c. 57, s. 12, the seal of the Patent Office (see s. 84) was substituted for the Great Seal; see ss. 14, 64, of the Act of 1907 (7 Edw. 7, c. 29).

(*b*) Coke, 3rd Instit. 181. See, as to the history of monopolies and patents, Gordon's "Monopolies by Patents"; also articles by Mr. Wyndham Hulme in L. Q. R. xii (1896), 141; xvi (1900), 44; xviii (1902), 280.

known occupation (*c*); for a patentee or grantee must be the inventor, or at least the introducer into the realm (*d*), of the thing which is the subject of the patent or grant; though under the Act of 1907 the grant may be made to others jointly with him (*e*).

Statute of Monopolies—21 Jac. 1, c. 3.

After great complaints, in the reigns of Elizabeth and James I., of the abuse of the prerogative by the granting of illegal monopolies, the law was, in 1624, declared and defined by the Statute of Monopolies, 21 Jac. 1, c. 3, which, after declaring that monopolies (*f*) are " altogether contrary to the laws of this realm " and shall be utterly void, proceeds to except patents for the term of fourteen years or under (*g*), granted for new inventions (*h*). This exception is contained in the following saving clause :—

> S. 6. " Any declaration before mentioned shall not extend to any letters patent and grants of privilege, for the term of fourteen years or under, hereafter to be made, of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor or inventors of such manufactures, which others, at the time of making such letters patent and grants, shall not use: so as also they be not contrary to the law, nor mischievous to the State by raising prices of commodities at home, or hurt of trade, or generally inconvenient (*i*); the said fourteen years to be accounted from the date of the first letters patent or grant of such privilege hereafter to be made; but that the same shall be of such force as they should be if this Act had never been made, and of none other."

The validity of a patent for an invention is to be ascertained by reference to the terms of the above

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(*c*) *Case of Monopolies*, otherwise *Darcy* v. *Allin* (1602), 11 Rep. 84 b.

(*d*) See *Darcy* v. *Allin* (44 Eliz.), Noy's Reports, 178, 182; per Jessel, M.R., in *Marsden* v. *Saville Street Co.*, (1878), 3 Ex. D. 206. Cp. *Clothworkers of Ipswich Case* (1615), Godb. 252.

(*e*) Ss. 1, 37.

(*f*) There described as privileges of " the sole buying, selling, making, working, or using anything within this realm."

(*g*) The Patents and Designs Act, 1919 (9 & 10 Geo. 5, c. 80), s. 6, increases the term to sixteen years.

(*h*) Such grants were valid at common law; 3rd Instit. 184.

(*i*) See *Re Hatschek*, [1909] 2 Ch. 68, 75, 90.

section of the 21 Jac. 1, c. 3 (*k*); and it will be observed that the section requires (*inter alia*) that :—

(1) The subject-matter of the patent must be a "manufacture," and must be "new" within the realm (*l*).

(2) The patentee must be the "true and first inventor."

(3) The invention must be one not already in use within the realm

Manufacture.

(1) As regards the legitimate subject-matter of a patent, the word "manufacture," as used in the statute, is taken to mean a vendible article produced by the art and hand of man.

New substance.

New mechanism.

New process.

"The word 'manufactures' has been generally understood to denote either a thing made, which is useful for its own sake, and vendible as such, as a medicine, a stove, a telescope, and many others; or to mean an engine or instrument, or some part of an engine or instrument, to be employed, either in the making of some previously known article, or in some other useful purpose, as a stocking frame, or a steam engine for raising water from mines. Or it may perhaps extend also to a new process to be carried on by known implements, or elements, acting upon known substances and ultimately producing some other known substance, but producing it in a cheaper or more expeditious manner, or of a better and more useful kind" (*m*).

No patent for a principle.

But "no merely philosophical or abstract principle can answer to the word 'manufactures.' For instance, supposing a person discovered that three angles of a triangle are equal to two right angles, that is an abstract discovery and would not be the subject of a patent" (*n*). "Something of a corporeal and substantial nature, something that can be made by man from the matters subjected to his art and skill, or at least some new mode of employing practically his art

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(*k*) See ss. 1, 93, of the Patents and Designs Act, 1907 (7 Edw. 7, c. 29).

(*l*) As to what is meant by "the realm," see *Rolls* v. *Isaacs* (1881), 19 Ch. D. 268.

(*m*) Per Abbott, C.J., *The King* v. *Wheeler* (1819), 2 B. & Ald. 349; 20 R. R. 465.

(*n*) *Young* v. *Rosenthal* (1884), 1 R. P. C. 31.

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and skill, is required to satisfy this word" (*o*). The patent must be for the vendible matter and not for the principle (*p*). The true foundation of all patents is the manufacture itself (*q*); but the thing patented may be either a new substance, or a new mechanism, or a new method or process (*r*) whereby articles can be produced more quickly and cheaply, though neither the thing produced nor the machinery producing it be novel; for "no novelty is required as to the object; the novelty may be in the means for effecting the object, whether old or new" (*s*). Although there can be no valid patent for a mere principle *per se*, yet where a principle is so embodied in and connected with corporeal substances as by a practical method or process to produce new results and effects in any art, trade, or manual occupation, there may be a valid patent for the combination of the new principle with the practical method of applying it (*t*).

"Invention," not discovery.

An invention is not the same thing as a discovery; if a man does nothing more than discover that a known machine can produce effects which it was not known that it could produce, his discovery, however great and useful, is not a patentable invention. Some addition must be made to previously known inventions, and either a new and useful thing or result must be produced, or a new and useful method of producing an old thing or result. But the discovery how to use a known thing for a useful purpose for which it has never before been used may be an "invention" if there is novelty in the mode of using it as distinguished from novelty of

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(*o*) *The King* v. *Wheeler*, *sup.*

(*p*) Per Heath, J., *Boulton* v. *Bull* (1795), 2 H. Bl. 482; 3 R. R. 439; see *British United Shoe Machinery Co.* v. *Standard Rotary Machine Co.* (1918), 35 R. P. C. 33 (H. L.).

(*q*) Per Buller, J., *ib.* 486.

(*r*) See as to new processes, *Crane* v. *Price* (1842), 4 M. & Gr. 580; 61 R. R. 614; Fletcher Moulton on Patents, 24.

(*s*) Per Wood, V.-C., *Curtis* v. *Platt* (1866), 3 Ch. D. 136 (note).

(*t*) See per Eyre, C.J., in *Boulton* v. *Bull* (1795), 2 H. Bl. 492, 494, 495; 3 R. R. 465; per Pearson, J., *Badische Anilin* v. *Levinstein* (1883), 24 Ch. D. 171, 172.

purpose, or if any new modification of the thing, or any new appliance, is necessary for using it for its new purpose (*u*).

Combination.

A combination may be the subject of a valid patent if the combination is new and useful, though each of the parts which enter into it be old (*x*), and the patent gives protection for each part that is new and material for the process, but not for a part which would not itself have been patentable (*y*).

True and first inventor.

(2) A person, who in a popular sense was not the true and first inventor, may yet be "the true and first inventor" in a legal sense; for instance, he may have been the first to have imported someone else's invention from abroad; or he may have been the first to make known an invention which others had also discovered but had not made known to the public. In *Plimpton* v. *Malcolmson*, Jessel, M.R., said (*z*):—

> "Shortly after the passing of the statute, the question arose whether a man could be called a first and true inventor who, in the popular sense, had never invented anything, but who, having learned abroad (that is, out of the realm, in a foreign country, because it has been decided that Scotland is within the realm for this purpose) that somebody else had invented something, quietly copied the invention, and brought it over to this country, and then took out a patent. As I said before, in the popular sense he had invented nothing. But it was decided, and now, therefore, is the legal sense and meaning of the statute, that he was a first and true inventor within the statute, if the invention, being in other respects novel and useful, was not previously known in this country—'known' being used in that particular sense, as being part of what had been called the common or public knowledge of the country. That was the first thing. Then there was a second thing. Suppose there were two people, actual inventors, in this country, who invented the same thing simultaneously, could either be said to be the first and true inventor? It was

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(*u*) *Lane-Fox* v. *Kensington Electric Lighting Co.*, [1892] 3 Ch. 424, 426, per Lindley, L.J.

(*x*) Per Ld. Campbell, C.J., *Lister* v. *Leather* (1858), 8 E. & B. 1016. See *Sirdar Rubber Co.* v. *Wallington*, [1905] 1 Ch. 451; [1906] 1 Ch. 252; *Nestlé & Co.* v. *Eugene, Lim.* (1921), 38 R. P. C. 73; *Mergenthaler Linotype Co.* v. *Intertype Co.* (1926), 43 R. P. C. 239.

(*y*) Per James, V.-C., *Parkes* v. *Stevens* (1869), 8 Eq. 367, 368.

(*z*) (1876), 3 Ch. D. 555.

decided that the man who first took out the patent was the first and true inventor. Then there was another point. If the man who took out the patent was not, in popular language, the first and true inventor, because somebody had invented it before, but had not taken out a patent for it, would he still, in law, be the first and true inventor? It was decided he would, provided the invention of the first inventor had been kept secret, or, without being actually kept secret, had not been made known in such a way as to become a part of the common knowledge, or of the public stock of information. Therefore, in that case also, there was a person who was legally the first and true inventor, although, in common language, he was not, because one or more people had invented it before him, but had not sufficiently disclosed it."

Prior discovery not patented or published.

This rule, however, that a communication from abroad enables a person to take out a patent, is anomalous; and a communication made in England by one British subject to another British subject does not make the recipient the "true and first inventor" (*a*).

Letters patent may be granted to a foreigner resident abroad for an invention communicated to him by another foreigner also resident abroad (*b*).

Anticipation—prior user or publication.

(3) "The consideration for a patent is the communication to the public of a process that is new" (*c*).

It is therefore often set up by way of defence to an action for infringement of a patent, that the alleged invention, the subject-matter of the patent, has been made known, or has been anticipated by use within the realm. "If the public once becomes possessed of an invention by any means whatever, no subsequent patent for it can be granted either to the true or first inventor himself, or any other person, for the public cannot be deprived of the right to use the invention, and a patentee of the invention could not give any consideration to the public for the grant, the public already possessing everything that he could give" (*d*).

(*a*) *Marsden* v. *Saville Street Co.* (1878), 3 Ex. D. 203.

(*b*) Per Ld. Cairns, C., *Re Wirth* (1879), 12 Ch. D. 303; Act of 1907, s. 1 (1).

(*c*) Per Ld. Blackburn, *Patterson* v. *Gas Light Co.* (1878), 3 App. Cas. 244.

(*d*) Hindmarch on Patents, 33; approved, as a correct statement of the law, per Ld. Blackburn, 3 App. Cas. 244.

Prior user or publication.

It is not necessary that the invention should be used by the public as well as known to the public. If the invention and the mode in which it can be used has been made known to the public by a description in a work which has been publicly circulated, or in a specification (*post*, p. 284), duly enrolled, unless the specification was deposited more than fifty years before or was "provisional" only (*e*), it avoids the patent, though it is not shown that it ever was actually put into use (*f*). A publication made without the patentee's knowledge or consent of matter derived or obtained from him will not invalidate a patent; but, if he learnt of the publication before applying for his patent, the patentee must have applied for protection for his invention with all reasonable diligence (*g*).

There must be either some prior use in this country, or some prior publication in this country of an intelligible description of the invention (*h*) which has become known here (*i*); and the *onus* is on the patentee to show that a prior publication did not become so known; for no evidence is necessary to show that the publication was in fact read or referred to; but, if proof is given that it was not sold or circulated, the publication would not be fatal to the patent (*k*). Moreover, the information as to the alleged invention given by the prior publication must be equal to that given by the subsequent patent; it must be "such that a person of ordinary knowledge of the subject (*i.e.*, an expert) would at once perceive, understand,

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(*e*) Act of 1907, ss. 7, 41.

(*f*) Per Ld. Blackburn, 3 App. Cas. 244, 245, and per Blackburn, J., *Betts* v. *Menzies* (1862), 10 H. L. C. 142. But the antecedent specification must disclose a practicable mode of producing the result which is the effect of the subsequent discovery; per Ld. Westbury, C., *Betts* v. *Menzies* (1862), 10 H. L. C. 154.

(*g*) S. 41 (2).

(*h*) Per Cotton and Lindley, L.JJ., *Harris* v. *Rothwell* (1887), 35 Ch. D. 427.

(*i*) See as to what extent of knowledge is sufficient, per Jessel, M.R., *Plimpton* v. *Malcolmson* (1876), 3 Ch. D. 556.

(*k*) Per Cotton and Lindley, L.JJ., *Harris* v. *Rothwell* (1887), 35 Ch. D. 428. The publication may be in a foreign language; *ib.* p. 429. Cp. *Pickard* v. *Prescott* (1892), 9 R. P. C. 195.

and be able practically to apply the discovery without the necessity of making further experiments and gaining further information before the invention can be made useful" (*l*).

Utility.

To be the subject of a valid patent an invention must be not only novel but useful, though the Statute of Monopolies does not mention utility (*m*). But it is not necessary to show that the invention will be commercially successful (*m*); and a small amount of utility is sufficient to support a patent (*n*). "Utility" in this connection does not mean abstract utility, but "an invention better than the preceding knowledge of the trade as to a particular fabric" (*o*).

An invention is useful by which an article, good though not so good as one of the same kind previously known, can be produced more cheaply by a different process (*p*).

Patents, &c. Act, 1907.

The grant and protection of a patent are now regulated by the Patents and Designs Acts, 1907 and 1919 (*q*), which were passed to consolidate the law relating to patents for inventions, and by the Patents Rules, 1920, made under those Acts.

Definitions of "patent"—"patentee"—"invention."

In the above Acts "patent" means "letters patent for an invention"; "patentee" means "the person for the time being entered on the register as the grantee or proprietor of the patent" and "invention" means "any manner of new manufacture the subject of letters patent and grant of privilege within s. 6 of the Statute of

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(*l*) Per Ld. Westbury, C., *Hill* v. *Evans* (1862), 4 De G. F. & J. 300; *Anglo-American Brush Co.* v. *King*, [1892] A. C. 378.

(*m*) Per Ld. Halsbury, C., *Badische Anilin* v. *Levinstein* (1887), 12 App. Cas. 712.

(*n*) Per Jessel, M.R., *Plimpton* v. *Malcolmson* (1876), 3 Ch. D. 582.

(*o*) Per Grove, J., *Young* v. *Rosenthal* (1884), 1 R. P. C. 34; *Lane-Fox* v. *Kensington Co.*, [1892] 3 Ch. 424; *Roth* v. *Cracknell* (1921), 38 R. P. C. 120. See further as to utility, Fletcher Moulton on Patents, Chap. V.

(*p*) *Welsbach Co.* v. *New Incandescent Co.*, [1900] 1 Ch. 843.

(*q*) 7 Edw. 7, c. 29; 9 & 10 Geo. 5, c. 80. The previous statutes were the Acts of 1835, 1852, 1853, 1883, 1885, 1886, 1888, 1901, 1902, and 1907 (c. 28), which are all repealed.

Monopolies " (*supra*, p. 276), " and includes an alleged invention " (*r*).

The Acts are not to take away, abridge, or prejudicially affect, the prerogative of the Crown in relation to the granting of letters patent or withholding a grant (*s*).

Who may apply for patent.

Any person (which includes a body corporate (*t*)) who claims to be the true and first inventor of an invention, whether a British subject or not, may apply for a patent (*u*); and two or more persons may apply and a patent be granted to them jointly, although some or one only be the true inventors or inventor (*u*). Formerly they must have been joint inventors. Co-patentees, unless otherwise specified in the patent, are treated as joint-tenants for the purpose of devolution of the legal interest (*x*); but, subject to any contract to the contrary, each may use the invention for his own profit, though he may not grant a licence without consent of the others (*y*); and the beneficial interest on the death of any one of them passes to his personal representative (*x*). If the inventor dies without applying for a patent, application may be made by, and a patent granted to, his " legal representative " (*z*).

Joint patentees.

Personal representative.

Application.

The application must be in the prescribed form, and must be left at, or sent by post to, the Patent Office (*a*). It must contain a declaration (*b*) to the effect that the applicant, or in a joint application one at least of the applicants, claims to be the true and first inventor (*c*).

(*r*) S. 93 of the Act of 1907, as amended by s. 19 of the Act of 1919.

(*s*) Act of 1907, s. 97.

(*t*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 19.

(*u*) Act of 1907, ss. 1, 37.

(*x*) *Ib.* s. 37.

(*y*) *Ib.*, s. 37. *Mathers* v. *Green* (1865), 1 Ch. 29, Goodeve, P. C. 298; *Steers* v. *Rogers*, [1892] 2 Ch. 13.

(*z*) S. 43. Before the Act of 1883 the legal personal representative could not take out a patent; *Marsden* v. *Saville Street Co.* (1878), 3 Ex. D. 203.

(*a*) S. 1 (2); and as to the Patent Office, s. 62.

(*b*) The declaration may be a statutory declaration under 5 & 6 Will. 4, c. 62, or not, as may be prescribed; s. 1 (4).

(*c*) S. 1 (3).

"True and first inventor."

The Act does not attempt to define who is "the true and first inventor"; to ascertain the meaning of the expression, recourse must still be had to the numerous decisions upon the Statute of Monopolies (*d*).

Publication at exhibitions.

The exhibition of an invention at, or the publication of a description during, an industrial or international exhibition, or the reading of a paper by an inventor before a learned society, or the publication of the paper in the society's transactions, do not prejudice the right of the inventor to apply for a patent, provided that he has given proper notice of his intention to do this, and applies for a patent within six months from the opening of the exhibition or the reading or publication of such paper (*e*). By Order in Council this protection may be extended to any exhibition, and the exhibitor be relieved from the condition as to notice (*f*).

It is part of the consideration for the grant of a patent that the patentee shall secure to the public the benefit of his discovery, so that at the expiration of the patent others may be able to work or make the manufacture of which the patentee was the inventor (*g*).

Specification.

The patentee has, therefore, ever since the time of Queen Anne, been required to furnish a description—called a "specification"—of the thing to be done and the manner of doing it, in such a way as to enable skilled persons to adopt the invention and make the manufacture. The object of requiring a specification is to enable persons of reasonable intelligence and skill in the subject-matter to tell from the inspection of the specification itself what the invention was for which the patent was granted. The specification must be such as, if fairly followed by a competent workman without invention or addition, would produce the thing for which the patent is taken out. It is supposed to be addressed

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(*d*) 21 Jac. 1, c. 3, *ante*, p. 276.
(*e*) S. 45 (1), as amended by s. 20 of Act of 1919.
(*f*) S. 45 (2).
(*g*) *Hornblower* v. *Boulton* (1799), 8 T. R. 100, 103; 3 R. R. 439.

to a practical workman who brings the ordinary degree of knowledge and capacity to the subject (*h*).

Provisional and complete specification.

Since the Act of 1852 (*i*) it has been the practice to furnish two specifications, first, a preliminary or "provisional" specification, which describes the *nature* of the invention, with the object of protecting an inventor until the filing of a second specification, called the "final" or "complete" specification, which must not only describe the nature of the invention, but must also show "in what manner it is to be performed" (*k*).

"The object of requiring the patentee to state" (by the provisional specification) "the nature of his invention is to let the public know what is the prohibited ground, and what they are not to do, what the patentee has got his grant for, which gives him a monopoly for fourteen (*l*) years. The object of requiring the patentee to describe" (by the complete specification) "the manner of carrying the invention into practical effect is to prevent the patentees from keeping to themselves the means of performing their inventions, so that after the monopoly for fourteen (*l*) years they could still use the thing, keeping secret the mode in which they did it" (*m*).

Disconformity.

It was an essential condition of a good patent that the provisional specification should describe the true nature of the invention, and that the invention there described should be the same as that claimed in the complete specification; and non-compliance with this condition was a defence to an action for infringement,

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(*h*) Per Parke, B., *Neilson* v. *Harford* (1841), 1 Webs. P. C. 314. See per Jessel, M.R., *Plimpton* v. *Malcolmson* (1876), 3 Ch. D. 568, 569; *Badische Anilin* v. *Levinstein* (1887), 12 App. Cas. 710; *Lane-Fox* v. *Kensington Co.*, [1892] 3 Ch. 424; *Gamage* v. *Spalding* (1915), 31 T. L. R. 178.

(*i*) 15 & 16 Vict. c. 83.

(*k*) *Stoner* v. *Todd* (1876), 4 Ch. D. 58, per Jessel, M.R. See, as to the difference between provisional and complete specifications, the authorities cited by Fry, J., in *United Telephone Co.* v. *Harrison* (1882), 21 Ch. D. 743 *et seq.*; *Siddell* v. *Vickers* (1887-90), 39 Ch. D. 92; 15 App. Cas. 496.

(*l*) Now sixteen: P. & D. Act, 1919, s. 6.

(*m*) Per Grove, J., *Philpott* v. *Hanbury* (1885), 2 R. P. C. 38.

and a ground for revocation of the patent (*n*). But the law in this respect has now been much modified (*o*), and a patent is not invalid upon the ground that the complete specification claims a further or different invention to that contained in the provisional if, so far as it is not contained in the provisional, it was novel at the date of the complete specification, and the applicant was the true and first inventor (*p*).

Specification under the Act of 1907.

The Act of 1907, therefore, requires that an application for a patent shall be accompanied by a "specification," which may be either "provisional" or "complete" (*q*). A provisional specification must describe the nature of the invention, and be accompanied by drawings if required (*r*); a complete specification must particularly describe and ascertain the nature of the invention, and in what manner it is to be performed, and must be accompanied by drawings, if required (*s*).

The officer under whose control the Patent Office is placed is called the Comptroller-General of Patents, Designs and Trade Marks, and he acts under the direction of the Board of Trade, by whom he is appointed.

He exercises a general supervision (*t*) over applications for patents and has functions of a judicial character in connection with such applications, subject to an appeal to the law officer, *i.e.*, the Attorney-General or Solicitor-General.

Opposition to grant.

Any person who has an interest in the subject-matter (*u*) may, within a limited time after the acceptance of a complete specification has been advertised, give notice at the Patent Office of opposition to the grant of a patent on the following grounds,—(1) that the applicant obtained the invention from him or from a

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(*n*) *Vickers* v. *Siddell* (1890), 15 App. Cas. 496; *Nuttall* v. *Hargreaves*, [1892] 1 Ch. 23.

(*o*) S. 42.

(*p*) See *Pneumatic Tyre Co.* v. *East London Co.* (1896), 14 R. P. C. 77, 573.

(*q*) S. 1 (3).

(*r*) S. 2 (1), (3).

(*s*) S. 2 (2), (3).

(*t*) Ss. 62, 63.

(*u*) *Reg.* v. *Comptroller-General*, [1899] 1 Q. B. 909.

person of whom he is the legal representative; or (2) that the invention has (prior to the date which the patent applied for would bear if granted) been claimed in any complete specification for a British patent which is or will be of prior date, other than a specification deposited pursuant to an application made more than fifty years before; or (3) that the nature of the invention or the manner in which it is to be performed is not sufficiently or fairly described and ascertained in the complete specification; or (4) that the complete specification describes or claims an invention other than that described in the provisional specification, and that such other invention forms the subject of an application made by the opponent in the interval between the leaving of the provisional specification and the leaving of the complete specification (*x*). The Comptroller is to decide on the case subject to an appeal to the law officer, who may call in the assistance of an expert (*y*).

Grant of patent.

If there is no opposition, or in case of opposition if the determination is in favour of the grant, the Comptroller is to cause a patent to be sealed, and granted to the applicant (*z*).

Extent of patent.

The patent must be for one invention only, but the specification may contain more than one claim; but no objection may be taken in any action or proceeding on the ground that the patent comprises more than one invention (*a*).

Where, however, the same applicant has put in two or more provisional specifications for inventions which are cognate or modifications one of the other, and has obtained provisional protection, the Comptroller may accept one complete specification in respect of the whole of the inventions if, in his opinion, the whole constitute a single invention, and grant a single patent thereon bearing the date of the earliest application (*b*).

(*x*) S. 11 (1); Patents, etc., Act, 1928, s. 1.

(*y*) S. 11 (2), (3).

(*z*) S. 12.

(*a*) S. 14 (2). See form of patent in Third Schedule to the Patents Rules, 1920.

(*b*) S. 16.

Date of grant.

Every patent is to be dated and sealed as of the day of the application; but no proceedings can be taken in respect of an infringement committed before the acceptance of the complete specification (*c*).

Provisional protection.

Where an application has been accepted, the invention may, between the date of application and of sealing, be used and published without prejudice to the patent to be granted; such protection from the consequences of use and publication is called "provisional protection" (*d*). The effect of this is to protect the inventor against the consequences of his own publication, but not to give him any rights as against the public until his patent is sealed, and even then the patent will not relate back to acts done in the interval (*e*).

Protection by acceptance of complete specification.

After the acceptance of a complete specification, until the date of sealing the patent or expiration of time for sealing, the applicant has the like privileges and rights as if a patent had been sealed on the date of acceptance of the complete specification; except that he cannot institute proceedings for infringement until a patent has been granted to him (*f*).

Power to refuse patent in certain cases.

The Comptroller may refuse to grant a patent for an invention, of which the use would, in his opinion, be contrary to law or morality (*g*).

Duration of patent.

The patent, when sealed, has effect throughout Great Britain, Northern Ireland and the Isle of Man (*h*). The term limited in the patent for its duration is sixteen years from its date; but the patent will cease on failure by the patentee to make the prescribed payments within the prescribed times, unless the time has been enlarged by the Comptroller for a period not exceeding three months (*i*).

(*c*) S. 13, as amended by s. 20 of Act of 1919.

(*d*) S. 4.

(*e*) Per Ld. Hatherley, C., *Ex p. Bates and Redgate* (1869), 4 Ch. 578.

(*f*) S. 10.

(*g*) S. 75.

(*h*) S. 14 (1). The Irish Free State Constitution Act, 1922, has provided for independent legislation in the Irish Free State.

(*i*) S. 17, as amended by s. 6 of Act of 1919.

Patent of addition.

When a patent has been applied for or granted, and the applicant or patentee applies for a futher patent for an improvement or modification of the invention, he may ask that the term limited in the further patent may be the same as, or for the unexpired term of, the original patent (*k*). In that case a "patent of addition" may be granted, which remains in force only as long as the original patent (*l*).

Extension of term of patent.

A patent may be extended on petition by a patentee to the High Court (which must be presented at least six months before the time limited for the expiration of the patent) for a further term not exceeding five, or, in exceptional cases, ten years, if the Court, having regard to the nature and merits of the invention in relation to the public, to the profits made by the patentee as such, and to all the circumstances of the case, thinks that the patentee has been inadequately remunerated by his patent; or a new patent may be granted for the term mentioned in the order, and containing any restriction, conditions, and provisions the Court may think fit (*m*).

Crown and officers of the Crown.

Before the Act of 1883 the Crown had a right to use a patented invention without compensation to the patentee (*n*). But now, all patents have the like effect against the Crown as they have against a subject; but any Government department may by themselves, their agents, contractors, or others, use the invention for the services of the Crown on terms to be, before or after the use thereof, agreed on, with the approval of the Treasury, between the department and the patentee, or in default of such agreement on such terms as may be settled by the Court who may refer the matter to be tried by a special or official referee or an arbitrator (*o*). The Act contains provisions whereby the Government may acquire and keep secret any inventions relating to instruments or munitions of war (*p*).

(*k*) S. 19 (1).

(*l*) S. 19 (2).

(*m*) S. 18, as amended by s. 7 of Act of 1919. *Re Johnson*, [1909] 1 Ch. 114; *Re Lodge*, [1911] 2 Ch. 46.

(*n*) *Dixon* v. *London Small Arms Co.* (1877), 1 App. Cas. 632, 659.

(*o*) S. 29, as amended by s. 8 of Act of 1919.

(*p*) S. 30.

Compulsory licences, or revocation.

Before the Act of 1907 there was no obligation upon a patentee to work his patent in this country, but that Act contained provisions enabling persons interested to secure the grant of compulsory licences, or alternatively, to obtain the revocation of the patent, on proof that the reasonable requirements of the public were not being satisfied, after three years had expired from the grant of the patent, unless the patentee could give satisfactory reasons for his default (*q*). Also, application might be made for its revocation on the ground that the patented article or process was being manufactured or carried on exclusively or mainly outside the United Kingdom, and the Comptroller was given power to revoke the patent unless the patentee proved that it was being worked to an adequate extent in the United Kingdom, or furnished satisfactory reasons why it was not so worked (*r*).

The Act of 1919 lays down the principle that "patents for new inventions are granted not only to encourage invention but to secure that new inventions shall so far as possible be worked on a commercial scale in the United Kingdom without undue delay," and confers on the Comptroller, for the prevention of "abuse of monopoly rights," extensive powers of granting compulsory licences, or even of revoking patents, where necessary to secure an adequate supply of the patented articles or the working of a patented process on a commercial scale in this country (*s*).

"Working on a commercial scale" means the manufacture of the article or the carrying on of the process described and claimed in a specification for a patent in or by means of a definite and substantial establishment or organisation, and on a scale which is adequate and reasonable under all the circumstances (*t*).

(*q*) S. 24; see *Re Robin Electric Lamp Co.'s Petition*, [1915] 1 Ch. 780.

(*r*) S. 27; Patents &c. Act, 1928, s. 2 (2); see *Re Hatschek*, [1909] 2 Ch. 68; *Re Fiat Motors*, [1911] 1 Ch. 66.

(*s*) S. 1 of Act of 1919, substituting a new s. 27 for s. 27 in the Act of 1907.

(*t*) S. 19 of Act of 1919.

Revocation.

The old complicated proceeding to repeal a patent by *scire facias* is abolished (*u*), and in place thereof revocation of a patent may be obtained on petition to the High Court; but every ground on which a patent might formerly be repealed by *scire facias* is still available by way of defence to an action of infringement, and is also a ground of revocation (*x*). A petition for revocation may be presented (*y*) by the Attorney-General or any person authorised by him, or by any person alleging that—

> (1.) The patent was obtained in fraud of his rights, or of the rights of any person under or through whom he claims:
>
> (2.) He or any person under or through whom he claims, was the true inventor of any invention included in the claim of the patentee:
>
> (3.) He or any person under or through whom he claims an interest in any trade, business, or manufacture, had publicly manufactured, used, or sold, within this realm, before the date of the patent, anything claimed by the patentee as his invention.

When a patent has been revoked on the ground of fraud, the Comptroller may, upon an application by the true inventor, grant to him a patent in lieu of, and bearing the same date as, the patent so revoked (*z*), but no action can be brought for infringement of his patent committed before it was actually granted (*a*). A patent granted to the true and first inventor will not be invalidated by an application in fraud of him, or by provisional protection obtained thereon, or by any use or publication during such protection (*b*).

Assignment.

A patentee may assign his patent for any place in or part of Great Britain, Northern Ireland, or the Isle of Man, as effectually as if it had been granted to extend to that place or part only (*c*). This does not limit his

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(*u*) S. 26 (1) of the Act of 1883 (46 & 47 Vict. c. 57).

(*x*) Act of 1907, s. 25 (1), (2).

(*y*) S. 25 (3).

(*z*) S. 15 (2).

(*a*) S. 15 (3).

(*b*) S. 15 (1).

(*c*) S. 14 (1). See *ante*, p. 288, note (*h*).

power of absolute assignment. The person registered as proprietor of a patent has, subject to any rights appearing from the register to be vested in any other person, power absolutely to assign, grant licences as to, or otherwise deal with, the same (*d*). Any equities, however, in respect of the patent may be enforced in like manner as in respect of any other personal property (*e*). The legal mode of assignment is by deed, but an equitable assignment may be registered (*f*). Notice of a trust express, implied, or constructive, however, cannot be entered on the register or be received by the Comptroller (*g*).

Equitable rights.

Registration of assignments, mortgages, &c.

The Comptroller must, on proof of title, register as proprietor of a patent a person who has become entitled to it by assignment, transmission, or other operation of law (*h*), and also register notice of the interest of a person who has become entitled, as mortgagee, licensee, or otherwise, to any interest in a patent (*i*).

(*d*) S. 71 (3).

(*e*) S. 71 (3). See *New Ixion Co.* v. *Spilsbury*, [1898] 2 Ch. 137. 484.

(*f*) *Re Casey's Patents*, [1892] 1 Ch. 104.

(*g*) S. 66.

(*h*) S. 71 (1).

(*i*) S. 71 (2).

CHAPTER XIV.

COPYRIGHT (*a*).

§ 1. *Literary and Artistic Copyright.*

Chap. XIV.

Copyright, what is.

The term "copyright" was defined by Lord Mansfield as signifying "an incorporeal right to the *sole* printing and publishing of somewhat intellectual, communicated by letters"; the right "to print a set of intellectual ideas or modes of thinking, communicated in a set of words and sentences and modes of expression"; "it is detached from the manuscript, or any other physical existence whatsoever" (*b*).

It is "property."

Being an exclusive right *in rem* as against all the world, it is to be considered as "property" in the author, or his assigns.

Rights: (1) to prevent publication; (2) to prevent multiplying copies.

The rights of the author of a literary work are, (1) before publication, to publish his work or not, as he thinks fit, and to prevent anybody else from publishing it (*c*); and (2) the right, after publication, of republishing and of restraining others from publishing it. This latter right is true "copyright," *i.e.*, the right to prevent others from multiplying copies (*d*), for until the work is published it is not open to be copied.

Two meanings of "copyright."

"The term 'copyright' may be understood in two different senses. The author of a literary composition which he commits

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(*a*) The Copyright Act, 1911, provides a statutory definition and gives a great extension to the meaning of the term "copyright." It is to include all the various rights enumerated in s. 1, sub-s. 2 of the Act. See *post*, p. 298. It is no longer confined to its strict sense of multiplying copies of a work already published, but includes, *inter alia*, making copies of a work which has not yet been published.

(*b*) Per Ld. Mansfield, C.J., *Millar* v. *Taylor* (1769), 4 Burr. 2303, 2396.

(*c*) 1 & 2 Geo. 5, c. 46, s. 1 (2). See *Prince Albert* v. *Strange* (1849), 1 Mac. & G. 42.

(*d*) *Trade Auxiliary Co.* v. *Middlesborough Assocn.* (1888), 40 Ch. D. 430.

to paper belonging to himself, has an undoubted right at common law to the piece of paper on which his composition is written, and to the copies which he chooses to make of it for himself or for others. If he lends a copy to another, his right is not gone. . . . The other sense of that word is the exclusive right of multiplying copies; the right of preventing all others from copying, by printing or otherwise, a literary work which the author has published. This must be carefully distinguished from the other sense of the word, . . . and it would tend to keep our ideas clear if, instead of 'copyright,' it was called the exclusive right of printing a published work, that being the ordinary mode of multiplying copies" (*e*).

Right to prevent publication of letters.

An instance of the right to prevent publication of unpublished matter is to be found in the case of private letters; for the author of such a letter retains the general property in it, and he, or his personal representative after his death (*f*), can restrain the person to whom it is addressed, as well as all other persons, from publishing it (*g*), or any part of it (*h*), but not from making other proper use of it, such as using the information contained in it for the purpose of writing a biography (*h*).

Copyright at common law.

It seems to be agreed that the author's right to prevent publication exists at common law (*i*): but whether the right, after publication, to prevent multiplication of copies belonged to anyone at common law, apart from statute, is a question on which the highest authorities have differed.

Origin and subject of copyright.

The ground of the author's right, and its subject-matter, are discussed as follows by Erle, J. (*k*):—

"The origin of the property is in production. As to works of imagination and reasoning, if not of memory, the author may be said to create, and, in all departments of mind, new books are the product of the labour, skill, and capital of the

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(*e*) Per Parke, B., *Jefferys* v. *Boosey* (1854), 4 H. L. C. 919. See, per Ld. St. Leonards, *ib.*, p. 978, as to this distinction.

(*f*) *Macmillan* v. *Dent*, [1907] 1 Ch. 107.

(*g*) *Pope* v. *Curl* (1741), 2 Atk. 342; *Thompson* v. *Stanhope* (1774), Amb. 737. As to lectures, see *post*, p. 300.

(*h*) *Philip* v. *Pennell*, [1907] 2 Ch. 577.

(*i*) See *Prince Albert* v. *Strange* (1849), 1 Mac. & G. 25; *Exchange, &c. Co.* v. *Gregory*, [1896] 1 Q. B. 147; *Bowden* v. *Amalgamated Pictorials*, [1911] 1 Ch. 386.

(*k*) *Jefferys* v. *Boosey* (1854), 4 H. L. C. 815. See also the remarks in 2 Bl. 405 *et seq.*

author. The subject of property is the order of words in the author's composition, not the words themselves, they being analogous to the elements of matter, which are not appropriated unless combined, nor the ideas expressed by those words, they existing in the mind alone, which is not capable of appropriation. The nature of the right of an author in his works is analogous to the rights of ownership in other personal property, and is far more extensive than the control of copying after publication in print, which is the limited meaning of copyright in its common acceptation. . . . . Thus, if, after composition, the author chooses to keep his writings private, he has the remedies for wrongful abstraction of copies analogous to those of an owner of personalty in the like case. He may prevent publication; he may require back the copies wrongfully made; he may sue for damages if any are sustained; also, if the wrongful copies were published abroad, and the books were imported for sale without knowledge of the wrong, still the author's right to his composition would be recognised against the importer, and such sale would be stopped.

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"Again, if an author chooses to impart his manuscript to others without general publication, he has all the rights for disposing of it incidental to personalty. He may make an assignment either absolute or qualified in any degree. He may lend, or let, or give, or sell any copy of his composition, with or without liberty to transcribe, and if with liberty of transcribing, he may fix the number of transcripts which he permits. If he prints for private circulation only, he still has the same rights, and all these rights he may pass to his assignee. About the rights of the author before publication all are agreed."

Books.
8 Anne, c. 19.

In 1709, the statute 8 Anne, c. 19 (*l*), was passed, imposing penalties for the protection of the exclusive rights of authors and their assigns to print, publish, and dispose of, copies of their works for the term of fourteen years, and for another term of the same duration if the author should be living at the end of the first term. The question arose, but was never finally determined, whether, anterior to the statute of Anne, there existed at common law a perpetual copyright in published works. The weight of authority in the time of Lord Mansfield was in favour of the existence of such a right, but the

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(*l*) So numbered in Ruffhead's ed., but it is 8 Anne, c. 21, in the Statutes of the Realm and in the Revised Statutes.

doctrine found less favour in modern times (*m*). It was, however, finally decided by the House of Lords in *Donaldson* v. *Becket* (*n*), that whether such a right did or did not exist before the statute of Anne, that statute had abridged the right of the author, so that he had thenceforth no property in his published works beyond the periods specified in the statute; and it must now be considered to be settled that copyright or protection to works of literature, after they have been published, exists only by statute (*o*).

Copyright Act, 1775.

In consequence of this decision, the statute 15 Geo. 3, c. 53, was passed for enabling the two universities in England, the four universities in Scotland, and the several colleges of Eton, Westminster, and Winchester, to hold in perpetuity their copyright in books, given or bequeathed to them for the advancement of learning and other purposes of education (*p*). And in 1801 and 1814 the statutes 41 Geo. 3, c. 107, and 54 Geo. 3, c. 156, were passed, extending for the benefit of authors the period of copyright.

Other Copyright Acts.

The statutes of 1709, 1801, and 1814 were repealed by the Copyright Act, 1842 (*q*), by which, as amended, the copyright in "books" and "dramatic pieces or musical compositions" has since been regulated. The right of representing dramatic pieces was also protected by the Dramatic Copyright Act, 1833 (*r*). The authors of lectures have been protected by the Lectures Copyright Act, 1835 (*s*); of engravings, prints, &c. by statutes of

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(*m*) Per Williams, J., in *Reade* v. *Conquest* (1861), 9 C. B. (N.S.) 755, 766. See *Jeffreys* v. *Boosey* (1854), 4 H. L. C. 815, *ante*, p. 294. and *Millar* v. *Taylor* (1769), 4 Burr. 2303.

(*n*) (1774), 4 Burr. 2408; Cobbett's Parl. Hist., XVII., p. 954.

(*o*) See per Williams, J., in *Reade* v. *Conquest*, *sup.*; referring to *Donaldson* v. *Becket* (1774), 4 Burr. 2408.

(*p*) The rights given by that Act were preserved by 5 & 6 Vict. c. 45, s. 27; but both those Acts are repealed by the Copyright Act, 1911 (1 & 2 Geo. 5, c. 46), though any copyright already possessed under the former Act is preserved by s. 33.

(*q*) 5 & 6 Vict. c. 45.

(*r*) 3 & 4 Will. 4, c. 15.

(*s*) 5 & 6 Will. 4, c. 65.

1734 (*t*), 1767 (*u*), 1777 (*x*), and 1852 (*y*); of sculptures, by the Sculpture Copyright Act, 1814 (*z*); of paintings, drawings, and photographs, by the Fine Arts Copyright Act, 1862 (*a*); and of designs, by a statute of 1883 (*b*), which was repealed, and in substance re-enacted by the Patents and Designs Act, 1907; this has now been amended by the Patents and Designs Act, 1919, and the Patents and Designs (Convention) Act, 1928.

All these statutes, except the Patents and Designs Acts (*c*), and some provisions of the Fine Arts Copyright Act, 1862, imposing penalties (*d*), are repealed by the Copyright Act, 1911 (*e*).

Copyright Act, 1911.

Abrogation of common law rights.

The Copyright Act, 1911 (*e*), contains what is practically a complete code of the law relating to copyright of every kind, except in respect of "designs" (*f*). All common law rights in respect of any literary, dramatic, musical, or artistic work, whether published or unpublished, are abrogated by this Act, and no person is to be entitled to copyright or any similar right in such works, except under the Act or any other statutory enactment for the time being in force (*g*); but any right or jurisdiction to restrain a breach of trust or confidence is preserved (*g*). Other important changes in the law effected by this Act are that the period of the duration of copyright is extended, and registration has ceased to be necessary.

Other changes.

The Act provides that copyright shall subsist, throughout those parts of His Majesty's dominions to which the Act extends (*h*), in every original (*i*) literary,

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(*t*) 8 Geo. 2, c. 13.

(*u*) 7 Geo. 3, c. 38.

(*x*) 17 Geo. 3, c. 57.

(*y*) 15 & 16 Vict. c. 12.

(*z*) 54 Geo. 3, c. 56.

(*a*) 25 & 26 Vict. c. 68.

(*b*) Patents, Designs and Trade Marks Act, 1883.

(*c*) As to designs, see *post*, p. 307.

(*d*) *Post*, p. 304.

(*e*) 1 & 2 Geo. 5. c. 46.

(*f*) As to designs, see *post*, p. 307.

(*g*) S. 31. See also s. 24 (3).

(*h*) See s. 25, *post*, p. 307.

(*i*) See *University of London Press, Lim.* v. *University Tutorial Press, Lim.*, [1916] 2 Ch. 601 (examination papers); *Macmillan & Co., Lim.* v. *Cooper* (1923), 40 T. L. R. 186 (extracts from non-copyright works with notes).

dramatic, musical, and artistic work which, in the case of a published work, was first published within those parts of the dominions (*k*), and, in the case of an unpublished work, the author of which was at the date of its making a British subject or resident (*l*) within those parts of the dominions.

"Copyright."

For the purposes of the Act "copyright" is defined to be (*m*) :—

> "The sole right to produce or reproduce the work or any part thereof in any material form whatsoever (*n*); to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof; and shall include the sole right:—
>
> (a) To produce, reproduce, perform or publish any translation of the work;
>
> (b) In the case of a dramatic work, to convert it into a novel or other non-dramatic work;
>
> (c) In the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise;
>
> (d) In the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered;
>
> and to authorise any such acts as aforesaid."

"Publication."

"Publication," in relation to any work, is for the purposes of the Act defined to be :—

> "The issue of copies of the work to the public, and does not include the performance in public of a dramatic or musical work, the delivery in public of a lecture, the exhibition in public of an artistic work, or the construction of an architectural work of art; but for the purposes of this provision the issue of photographs and engravings of works of sculpture and architectural works of art shall not be deemed to be publication of such works" (*o*).

Effect of first publication, &c. without consent of author.

Except for the purposes of infringement, a work is

(*k*) See s. 35 (3). Alien authors may be excluded from the benefit of the Act by Order in Council: see *post*, p. 306.

(*l*) See s. 35 (4). If he is domiciled, he is to be deemed to be resident: s. 35 (5).

(*m*) S. 1 (2).

(*n*) See *Bradbury, Agnew & Co.* v. *Day* (1916), 32 T. L. R. 349 (infringement of copyright in *Punch* cartoons by "living pictures").

(*o*) S. 1 (3).

not to be deemed to be published or performed, or a lecture to be delivered in public, if published, performed, or delivered, without the consent of the author or his representatives or assigns (*p*).

Other definitions.

The Act contains the following further definitions (*q*):—

"Literary work";

"Literary work" includes maps, charts, plans, tables, and compilations.

"Dramatic work";

"Dramatic work" includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and any cinematograph production where the arrangement or acting form or the combination of incidents represented give the work an original character.

"Artistic work";

"Artistic work" includes works of painting, drawing, sculpture, and artistic craftsmanship, and architectural works of art, and engravings and photographs.

"Work of sculpture";

"Work of sculpture" includes casts and models.

"Architectural work of art";

"Architectural work of art" means any building or structure having an artistic character or design, in respect of such character or design, or any model for such building or structure, provided that the protection afforded by this Act shall be confined to the artistic character or design and shall not extend to processes or methods of construction.

"Engravings";

"Engravings" include etchings, lithographs, wood-cuts, prints, and other similar works not being photographs.

"Photograph";

"Photograph" includes photo-lithograph and any work produced by any process analogous to photography.

"Cinematograph";

"Cinematograph" includes any work produced by any process analogous to cinematography.

"Collective work";

"Collective work" means (a) an encyclopædia, dictionary, year-book, or similar work; (b) a newspaper, review, magazine, or similar periodical; and (c) any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated.

"Infringing";

"Infringing," when applied to a copy of a work in which copyright subsists, means any copy, including any colourable imitation, made or imported in contravention of the provisions of this Act.

"Performance";

"Performance" means any acoustic representation of a work and any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument.

"Delivery";

"Delivery," in relation to a lecture, includes delivery by means of any mechanical instrument.

"Plate";

"Plate" includes any stereotype or other plate, stone, block, mould, matrix, transfer, or negative, used or intended

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(*p*) S. 35 (2).

(*q*) S. 35 (1).

to be used for printing or reproducing copies of any work, and any matrix or other appliance by which records, perforated rolls, or other contrivances for the acoustic representation of the work are or are intended to be made.

"Lecture."

"Lecture" includes address, speech, and sermon.

What is an infringement.

Exceptions.

Any person who, without the consent of the owner, does anything the sole right to do which is conferred on the owner, infringes the copyright (*r*). It is not, however, an infringement: (1) to deal fairly with a work for the purposes of private study, research, criticism, review, or newspaper summary (*s*); or (2) for the author of an artistic work, who is not the owner of the copyright, to use any mould, cast, sketch, plan, model, or study made by him for the purpose of the work, if he does not repeat or imitate the main design of the work; or (3) to make or publish paintings, drawings, engravings, or photographs of a work of sculpture or artistic craftsmanship, if permanently situate in a public place or building, or of any architectural work of art (if they are not in the nature of architectural drawings or plans); (4) to publish in a school book, mainly composed of non-copyright matter, short passages from published literary works which are not copyright school books; (5) to publish in a newspaper a report of a published lecture, unless the report is prohibited by a notice on the building where the lecture is given (*t*); or (6) for one person to read or recite in public a reasonable extract from a published work (*u*).

Particular acts of infringement.

In particular there is an infringement by any person who—

(1) Sells or lets for hire, or by way of trade exposes or offers for sale or hire; or

(2) Distributes for purposes of trade, or to an extent

(*r*) S. 2 (1). See *Chappell & Co., Lim.* v. *Columbia Gramophone Co.*, [1914] 2 Ch. 745; *Messager* v. *British Broadcasting Co.*, [1927] 2 K. B. 543 (wireless broadcasting).

(*s*) See *Chatterton* v. *Cave* (1878), 3 App. Cas. 492; *Warne* v. *Seebohm* (1888), 39 Ch. D. 79; *Leslie* v. *Young*, [1894] A. C. 335, 341; *British Oxygen Co.* v. *Liquid Air, Ltd.*, [1925] Ch. 383.

(*t*) As to an "address of a political nature," see *post*, p. 306.

(*u*) S. 2 (1).

which prejudicially affects the owner of the copyright; or

(3) Exhibits in public by way of trade; or

(4) Imports for sale or hire into any part of the dominions to which the Act extends,

any work which to his knowledge infringes or would infringe copyright if made in the part of the dominions in or into which the act or importation took place (*x*).

Infringement by permitting public performance.

Any person who for his private profit permits a theatre or place of entertainment to be used for the public performance of a work without the consent of the owner of the copyright, infringes the copyright, unless he did not know and had no reasonable ground for suspecting that the performance would infringe any copyright (*y*).

Duration of copyright.

The term for which copyright will subsist is now, in general, extended to the life of the author, and a period of fifty years after his death (*z*). But after the lapse of twenty-five years (or thirty years if the copyright subsisted at the passing of the Act (*a*)) from the death of the author of a published work, any person may reproduce the work for sale if he has given the prescribed notice and pays to the owner of the copyright a royalty on each copy sold at the rate of 10 per cent. on the published price (*z*).

Compulsory licences.

At any time after the death of the author of a literary, dramatic, or musical work which has been published or performed in public, complaint may be made to the Privy Council that the owner of the copyright has refused to republish or allow republication, or to allow performance in public, and that the work is

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(*x*) S. 2 (2).

(*y*) S. 2 (3). See *Sarpy* v. *Holland*, [1908] 1 Ch. 443; 2 *id.* 198; *Karno* v. *Pathé*, 100 L. T. 260; *Performing Right Society* v. *Ciryl Theatrical Syndicate*, [1924] 1 K. B. 1; *Performing Right Society* v. *Mitchell and Booker*, [1924] 1 K. B. 762.

(*z*) S. 3. As to the duration in the case of joint authorship, see *post*, p. 304; of posthumous works, *post*, p. 305; of Government publications, *post*, p. 305; of mechanical contrivances such as records, &c., *post*, p. 306; and of photographs, *post*, p. 306.

(*a*) Dec. 16, 1911.

thereby withheld from the public, and thereupon an order may be made to grant a licence for reproduction or public performance (*b*).

Ownership of copyright; photographs, engravings, &c.; contributions to newspapers, &c.

The author of a work is the first owner of the copyright (*c*). To this rule there are some exceptions. If the plate, or other original, of an engraving, photograph, or portrait, was made to the order of another person, and for valuabe consideration, then, in the absence of any agreement to the contrary, the person who gave the order is the first owner of the copyright (*d*). And, if the author makes the work during and in pursuance of a contract of employment, the employer is the first owner of the copyright, unless it has been otherwise agreed (*e*). In the case of a contribution to a newspaper, magazine, or other similar periodical, the author can, however, restrain its publication except in such a periodical (*e*).

"Author."

The term "author" is frequently used in the Act, but is not defined; and it is difficult to determine precisely what is its meaning in relation to copyright (*f*). An "author" may come into existence without producing any original matter of his own (*g*). Thus, a person who makes notes of a speech delivered in public, and publishes a verbatim report, may be the "author" for the purpose of copyright (*g*).

Right to assign or grant licences.

The owner of copyright can assign the right, either wholly or partly, and can grant licences. The assignment or grant must be in writing signed by the owner or his agent (*h*).

Restriction on power to assign.

An author who is the first owner of the copyright cannot, however, assign or grant any interest in the copyright (except by will) to operate beyond the expiration of twenty-five years from his death (*h*); and the

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(*b*) S. 4.

(*c*) S. 5 (1).

(*d*) S. 5 (1) (a).

(*e*) S. 5 (1) (b); *Con Planck, Ltd.* v. *Kolynos*, [1925] 2 Ch. 804.

(*f*) See *Tate* v. *Thomas*, [1921] 1 Ch. 503.

(*g*) *Walter* v. *Lane*, [1900] A. C. 539; see *Dicks* v. *Yates* (1881), 18 Ch. D. 76; *Borthwick* v. *Evening Post* (1888), 37 *id.* 449.

(*h*) S. 5 (2).

reversionary interest expectant on the termination of that period vests, on the death of the author, in his personal representatives as part of his estate, notwithstanding any agreement to the contrary (*h*). This provision does not apply to a collective work (*h*).

Partial assignment.

When there has been only a partial assignment the assignee, as to the rights assigned, and the assignor, as to the rights not assigned, is the owner of the copyright (*i*).

Remedies for infringement.

When his copyright has been infringed the owner has all the same remedies, by way of injunction, damages, accounts, or otherwise, as are conferred by law for the infringement of a right (*k*).

Infringing copies.

All infringing copies of a work in which copyright subsists, and all plates intended for the production of such copies, are deemed to be the property of the owner of the copyright, and he can sue to recover possession of them or in respect of their conversion (*l*).

Innocent infringer.

An innocent infringer, that is, a person who was not aware of the existence of copyright in a work, and had no reasonable ground for suspecting that it existed, is liable only to an injunction (*m*).

Restriction of remedies in case of architecture.

If a building or structure which has been commenced infringes, or would if completed infringe, the copyright in some work, an injunction to restrain its construction or an order for its demolition cannot be obtained (*n*); and neither the before-mentioned provision as to infringing copies becoming the property of the owner of the copyright, nor the provisions as to summary penalties (*o*), apply (*p*).

Limitation of actions.

Actions in respect of infringement of copyright must be brought within three years of the infringement (*q*).

Penalties.

Knowingly to commit any of the acts specified in sect. 2 (2) (*r*) as infringements, and knowingly to make or possess any plate for the purpose of infringement, or knowingly and for private profit to cause a copyright work to be performed in public without consent of

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(*i*) S. 5 (3).
(*k*) S. 6.
(*l*) S. 7.
(*m*) S. 8.
(*n*) S. 9 (1).
(*o*) *Infra*.
(*p*) S. 9 (2).
(*q*) S. 10
(*r*) *Ante*, pp. 300-1.

the owner, are offences punishable on summary conviction (*s*).

In prosecutions for those offences the Court may, whether there is or is not a conviction, order all infringing copies or plates in the possession of the alleged offender to be destroyed or given up to the owner of the copyright (*t*).

There are special statutory provisions for summary remedies in the case of pirated copies of musical works (*u*), and in the case of paintings, drawings, and photographs also there are special penalties imposed for fraudulent productions and sales, which can be recovered by the person aggrieved either by action or by summary proceedings (*x*).

Delivery of books to British Museum and other libraries.

The publisher of every book (*y*) published in the United Kingdom must deliver a copy at his own expense to the British Museum, and also, subject to certain conditions, to the Bodleian Library at Oxford, the University Library at Cambridge, the Library of the Faculty of Advocates at Edinburgh, the Library of Trinity College, Dublin, and the National Library of Wales (*z*).

Joint authors;

When a work is made by joint authors, copyright subsists during the life of the author who dies first and fifty years after his death, or during the life of the survivor, whichever period is the longer (*a*).

(*s*) S. 11 (1) and (2).

(*t*) S. 11 (3).

(*u*) Musical Copyright Act, 1902 (2 Edw. 7, c. 15); and Musical Copyright Act, 1906 (6 Edw. 7, c. 36), which is amended as to s. 3 by Sched. 2 of the Copyright Act, 1911, by omitting the provision as to registration. See *Ex p. Francis*, [1903] 1 K. B. 275; *Mabe* v. *Connor*, [1909] 1 K. B. 515.

(*x*) Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), ss. 7 and 8, as amended by the Copyright Act, 1911, Sched. 2. *Carlton Illustrators* v. *Coleman*, [1911] 1 K. B. 771.

(*y*) "Book" is nowhere defined in the Act. By s. 3 of the Copyright Act, 1842 (5 & 6 Vict. c. 45), it was defined as "every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan separately published": see *Stannard* v. *Lee* (1871), L. R. 6 Ch. Ap. 346; *Aflalo* v. *Lawrence*, [1904] A. C. 17; *Boosey* v. *Whight*, [1900] 1 Ch. 122; *Hollingrake* v. *Truswell*, [1894] 3 Ch. 420.

(*z*) S. 15.

(*a*) S. 16 (1).

If one or more of joint authors do not satisfy the conditions conferring copyright, the work is to be treated as if the other or others had been the sole author or authors (*b*); but in this case the term of the copyright is the same as if all the authors had satisfied those conditions (*b*).

definition;

A "work of joint authorship" is one produced by the collaboration of two or more authors, in which the contribution of one is not distinct from that of the other or others (*c*).

A joint owner may restrain a publication by the other joint owner which infringes the copyright in the joint publication (*d*).

husband and wife.

Where a husband and wife are joint authors the interest of the wife in the work is her separate property (*e*).

Posthumous works;

Where a literary, dramatic or musical work, or an engraving, in which copyright subsists at the death of the author, or at or immediately before the death of the surviving joint author, has not been published or publicly performed or delivered before his death, copyright subsists until publication or public performance or delivery and for a further term of fifty years (*f*); and the provision (*g*) as to reproduction by others after twenty-five years from the death of the author applies as if the author had died at the date of publication or public performance or delivery (*f*). The ownership, under a testamentary disposition by an author, of his manuscript of a work which has not been published or publicly performed or delivered, is *primâ facie* proof that the owner of the manuscript is owner of the copyright (*h*).

ownership of copyright.

Government publications.

The copyright in all Government publications, subject to any agreement with the author, belongs to the Crown,

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(*b*) S. 16 (2).
(*c*) S. 16 (3).
(*d*) *Cascinsky* v. *Routledge*, [1916] 2 K. B. 325.
(*e*) S. 16 (4).
(*f*) S. 17 (1).
(*g*) *Ante*, p. 301.
(*h*) S. 17 (2). See *Philip* v. *Pennell*, [1907] 2 Ch. 577; *Macmillan* v. *Dent*, [1907] 1 Ch. 107.

and continues for a period of fifty years from the first publication of the work (*i*).

Mechanical instruments; copyright in; "author."

Copyright subsists in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in the same manner as if those contrivances were musical works; the term is fifty years from the making of the original plate; and the owner of the original plate at the time when it was made is deemed to be the "author" (*k*).

Right of any person to reproduce.

Any person may, within the parts of the dominions to which the Act extends (*l*), make records, perforated rolls, or other contrivances by means of which any musical work may be mechanically performed, if such contrivances have previously been made with the consent or acquiescence of the owner of the copyright, and he has given the prescribed notice and pays the prescribed royalties (*m*).

Reports of political addresses.

A report in a newspaper of an "address of a political nature" is not an infringement of copyright in the address (*n*). The Act does not contain any definition of the term "political," and its interpretation will probably be a very difficult question.

Photographs; duration of copyright; "author."

Copyright subsists in photographs for a term of fifty years from the making of the original negative; and the person who was the owner of the negative when it was made is deemed to be the "author" of the work (*o*).

Alien authors.

If a foreign country does not give or undertake to give adequate protection to the works of British authors, an Order in Council may be made directing that the provisions (*p*) which confer copyright on works first published within the parts of the dominions to which the Act extends shall not apply to works of authors who are subjects or citizens of that foreign country, and do not reside in His Majesty's dominions (*q*).

(*i*) S. 18.

(*k*) S. 19 (1).

(*l*) S. 25, *post*, p. 307.

(*m*) S. 19 (2)-(6).

(*n*) S. 20.

(*o*) S. 21. See *Boucas* v. *Cooke*, [1903] 2 K. B. 227; *Stackemann* v. *Paton*, [1906] 1 Ch. 774.

(*p*) *Ante*, p. 297.

(*q*) S. 23.

Extent of Act; British dominions; self-governing dominions; Protectorates.

The provisions of the Act, except those expressly restricted to the United Kingdom, apply throughout His Majesty's dominions (*r*); but, in the case of a self-governing (*s*) dominion, its legislature must have declared the Act to be in force (*r*). By Order in Council the Act may be extended to any Protectorate (*t*).

§ 2. *Designs.*

Designs.

In 1787 an Act (*u*) was first passed for the encouragement of the arts of designing and printing linens, cottons, calicoes, and muslins, by granting the sole right to use any new *and* original pattern for printing the same during the period of three months. The period of protection was subsequently prolonged (*x*); and the principle of the Act was extended to secure to proprietors of designs for certain articles of manufacture the copyright of such designs for a limited time (*y*). In 1842 a consolidating and amending Act was passed for the protection of the copyright of designs for ornamenting articles of manufacture, and the prior Acts were repealed (*z*). This Act, with the subsequent amending Acts, was repealed by the Patents, Designs and Trade Marks Act, 1883 (*a*), under which, and the amending Acts of 1885, 1886, and 1888 (*b*), the protection to the proprietor of any new *or* original design was regulated.

Patents and Designs Acts, 1907 and 1919.

The Act of 1883, with its amending Acts, was repealed by the Patents and Designs Act, 1907 (*c*), by which, as amended by the Patents and Designs Act, 1919 (*d*), and the Designs Rules, 1920, made thereunder, the law relating to copyright in designs is now regulated. This Act contains the following definitions (*e*) :—

Definitions.

(*r*) S. 25; see ss. 26, 27.

(*s*) See s. 35 (1) for definition of "self-governing dominion."

(*t*) S. 28.

(*u*) 27 Geo. 3, c. 38.

(*x*) 29 Geo. 3, c. 19; 34 Geo. 3, c. 23; and 2 Vict. c. 13.

(*y*) 2 Vict. c. 17.

(*z*) 5 & 6 Vict. c. 100, s. 1.

(*a*) 46 & 47 Vict. c. 57, s. 113.

(*b*) 48 & 49 Vict. c. 63; 49 & 50 Vict. c. 37; 51 & 52 Vict. c. 50.

(*c*) 7 Edw. 7, c. 29, Part II., ss. 49-61.

(*d*) 9 & 10 Geo. 5, c. 80.

(*e*) S. 93, as amended by ss. 19 and 20 of the Act of 1919.

"Design";

"Design" (*e*) means only the features of shape, configuration, pattern, or ornament applied to any article by any industrial process or means, whether manual, mechanical, or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction, or anything which is in substance a mere mechanical device:

"article";

"Article" means (as respects designs) any article of manufacture and any substance artificial or natural, or partly artificial and partly natural:

"copyright";

"Copyright" means the exclusive right to apply a design to any article in any class in which the design is registered:

"proprietor";

"Proprietor of a new or original design,"—

(a) Where the author of the design, for good consideration, executes the work for some other person, means the person for whom the design is so executed; and

(b) Where any person acquires the design or the right to apply the design to any article, either exclusively of any other person or otherwise, means in the respect and to the extent in and to which the design or right has been so acquired, the person by whom the design or right is so acquired; and

(c) In any other case, means the author of the design; and where the property in, or the right to apply, the design has devolved from the original proprietor upon any other person, includes that other person.

Registration.

On application by any person claiming to be the proprietor of any new (*f*) or original (*f*) design not previously published (*g*) in the United Kingdom, made in the prescribed (*h*) form and manner, the Comptroller may register the design (*i*). The same design may be registered in more than one class (*k*); and copyright is limited to the class or classes in which the design is registered (*l*). The Comptroller may refuse to register any design, subject to appeal, to the Court, or, in certain

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(*e*) S. 93, as amended by ss. 19 and 20 of the Act of 1919.

(*f*) *Dover* v. *Nürnberger, &c.*, [1910] 2 Ch. 25; *Re Bach* (1889), 42 Ch. D. 661; *Re Clarke*, [1896] 2 Ch. 38.

(*g*) *Blank* v. *Footman* (1888), 39 Ch. D. 678; *Re Clarke*, *sup.* See ss. 50, 55.

(*h*) See Designs Rules, 1920.

(*i*) S. 49 (1).

(*k*) Ss. 49 (2), 50. The Designs Rules, 1920, classify goods; r. 6 and Sched. 3.

(*l*) See definition of "copyright," *sup.*; and *Re Read* (1889), 42 Ch. D. 260.

cases, to the law officer (*m*). A certificate of registration must be given to the proprietor of a design when registered (*n*); and a copy may be given if the original is lost, or in any other case in which it is deemed expedient (*n*).

Duration of copyright.

When a design is registered, the registered proprietor has copyright for five years from the date of registration (*o*); and upon application in the prescribed (*p*) time and manner, the Comptroller *must* extend the period of copyright for a second term of five years (*q*), and *may* subsequently extend it for a third period of five years (*r*).

Requirements before sale of articles with registered design.

Before delivery on sale of any articles to which a registered design has been applied, the proprietor must have furnished the Comptroller with the prescribed number of exact specimens of the design (*s*), and have caused each article to be marked with the prescribed mark denoting that the design is registered (*t*). If the former condition is not complied with, the registration may be erased, and the copyright will then cease (*s*); and if the latter condition is not observed, the proprietor cannot recover any penalty or damages for infringement, unless he shows that he took all proper steps to ensure the marking of the article (*u*), or he shows that the infringer knew of the existence of the copyright in the design (*x*).

Inspection of registered design.

During the existence of copyright, or such shorter period not less than two years, as may be prescribed by the rules, the design is not open to inspection except by the proprietor or a person authorised by him (in writing), or by the Comptroller or the Court (*y*), and

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(*m*) S. 49 (3), as amended by s. 20 of Act of 1919; s. 75, as amended by s. 17 of Act of 1919.

(*n*) S. 51.

(*o*) S. 53 (1).

(*p*) Designs Rules, 1920.

(*q*) S. 53 (2).

(*r*) S. 53 (3).

(*s*) S. 54 (1) (a).

(*t*) S. 54 (1) (b).

(*u*) See *Wittman* v. *Oppenheim* (1884), 27 Ch. D. 260.

(*x*) S. 54 (1) (b).

(*y*) S. 56 (1).

the person inspecting may not take a copy of the design or any part of it (*y*). After the expiration of the copyright, or the shorter period prescribed, the design may be inspected and copies taken (*z*).

Information as to existence of copyright.

On the request of any person furnishing information enabling the Comptroller to identify the design, he must be informed whether the design is still registered, and, if so, in respect of what classes of goods, and as to the date of registration and the name and address of the proprietor (*a*).

Cancellation of registration.

At any time after the registration of a design any person interested may apply to the Comptroller for the cancellation of the registration of the design on the ground (a) that the design has been published in the United Kingdom prior to the date of registration, or (b) that it is applied by manufacture to any article in a foreign country, and is not so applied by manufacture in the United Kingdom to such an extent as is reasonable in the circumstances of the case (*b*).

If the application is on ground (b), the Comptroller may, in lieu of cancellation, order the grant of a compulsory licence on such terms as he may consider just (*b*).

An appeal may be made from any order so made to the Court, and the Comptroller may at any time refer any such application to the Court for trial (*c*).

Showing or using design at exhibitions.

The exhibition at an industrial or international exhibition, or elsewhere during the period of the exhibition without the privity or consent of the proprietor, of a design or any article to which it is applied, or the publication during the exhibition of a description of a design, will not prevent the design being registered or invalidate its registration (*d*); provided that the exhibitor gives the Comptroller notice of his intention to exhibit, and the application for registration is made within six months after the opening of the exhibition (*d*).

(*y*) S. 56 (1).

(*z*) S. 56 (2).

(*a*) S. 57.

(*b*) S. 58 (1).

(*c*) S. 58 (2); s. 14 of Act of 1919.

(*d*) S. 59.

Piracy.

It is unlawful for any person during the existence of copyright in a design, without the written consent of the registered proprietor, for the purposes of sale, to apply or cause to be applied to any article in a class of goods in which the design is registered the design or any fraudulent or obvious imitation, or to do anything with a view to enable it to be so applied (*e*); or to publish or expose for sale any article knowing that the design or any fraudulent or obvious imitation has been applied to it without the proprietor's consent (*f*).

Remedies.

For every such offence the registered proprietor may recover in an action against the offender a sum not exceeding £50 as a simple contract debt, but not more than £100 in respect of any one design (*g*). If he so elects, the registered proprietor may sue for damages and an injunction (*h*).

Offences punishable summarily by fine.

Any person who falsely describes a design applied to an article sold by him as registered is punishable on summary conviction by a fine of £5 (*i*), and, if he sells an article marked with the word "registered" or any word implying that the design is registered, he is deemed to so describe the article (*k*), and any person who, after the expiration of copyright in a design, uses the word "registered," or any word implying that there is subsisting copyright in a design, is liable to a like fine (*l*).

§ 3. *International Copyright.*

International copyright.

As regards literary and artistic works first published in a foreign country, certain statutes, styled the International Copyright Acts (*m*), were passed, authorising the making of Orders in Council directing that the author

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(*e*) S. 60 (1).

(*f*) S. 60 (1).

(*g*) S. 60 (2).

(*h*) S. 60 (2). See *Woolley* v. *Broad*, [1892] 1 Q. B. 806; *Werner* v. *Gamage*, [1904] 1 Ch. 264; 2 *id.* 580.

(*i*) S. 89 (2).

(*k*) S. 89 (3).

(*l*) S. 89 (4).

(*m*) 7 & 8 Vict. c. 12; 15 & 16 Vict. c. 12; 25 & 26 Vict. c. 68 s. 12; 38 & 39 Vict. c. 12.

should have copyright in the same during the period specified by the Order, which could not exceed the period during which authors of the like works first published in the United Kingdom had copyright. In 1885, an International Conference was held at Berne, and a draft convention agreed to for giving to authors of literary and artistic works, first published in one of the countries parties to the convention, copyright in such works throughout the other countries parties to the convention. For the purpose of carrying such convention into effect in His Majesty's dominions, the International Copyright Act, 1886, was passed (*n*); and, in 1887, an Order in Council was issued adopting the Berne Convention, which Order was to be construed as if it formed part of the Act of 1886 (*o*). That convention was adopted by England, Belgium, France, Germany, Italy, Spain, Switzerland, Japan, and some other less important States, and these countries formed what was called the "Copyright Union." Within this union the copyright of authors belonging to any one of these countries was protected in the other countries. Subsequently, conferences at Paris, in 1896, and at Berlin, in 1908, resulted in the issue of the Revised Berne Convention of 1908 (*p*).

Under the Copyright Act, 1911.

All the above Acts have been repealed by the Copyright Act, 1911 (*q*), which contains the following provisions in relation to international copyright.

Application of the Act to foreign works and authors by Order in Council.

An Order or Orders in Council may be made directing that the Act of 1911 (except any part excluded by the Order) shall apply: (i.) to works first published in a foreign country in the same manner as if they were first published within the dominions to which the Act extends; (ii.) to literary, dramatic, musical, and artistic works, the authors of which were at the time of the making of the work subjects or citizens of a foreign

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(*n*) 49 & 50 Vict. c. 33.
(*o*) S. 8 of the Order.
(*p*) Copinger (ed. 6), Part IV, Ch. I, and Appendix C.
(*q*) 1 & 2 Geo. 5, c. 46.

country to which the Order relates, in the same manner as if they were British subjects; (iii.) in respect of residence in a foreign country to which the Order relates, in the same manner as if that residence were residence within the dominions to which the Act extends (*r*).

Modifications by the Order of the application of the Act.

The Order may provide that the term of copyright shall not exceed that conferred by the law of the country to which the Order relates; that the enjoyment of the rights conferred by the Act shall be subject to any conditions and formalities prescribed by the Order (*s*); that the provisions as to ownership of copyright shall be modified having regard to the law of the foreign country; and that the provisions as to existing works shall be modified (*t*).

Remedies for infringement in foreign country, or of foreign copyright.

In order to prevent infringements in a foreign country a British author must take proceedings in the Courts of that country (*u*). A person suing in this country to prevent infringement of a foreign copyright must show that he is entitled to protection in the foreign country, and then his remedy depends on English law (*x*). The owner of the British copyright in a book first published in a foreign country can prevent the importation into Great Britain of copies printed in that foreign country by the proprietor of the copyright there (*y*).

(*r*) Ss. 29, 30.
(*s*) See *Sarpy* v. *Holland*, [1908] 1 Ch. 443; 2 *id.* 198.
(*t*) S. 29.
(*u*) *Morocco Bound* v. *Harris*, [1895] 1 Ch. 535.
(*x*) *Baschet* v. *London Co.*, [1900] 1 Ch. 73.
(*y*) *Pitts* v. *George*, [1896] 2 Ch. 866.

CHAPTER XV.

COMPANIES—SHARES—DEBENTURES —DEBENTURE STOCK.

§ 1. *Companies—Shares.*

Chap. XV.

Lord Lindley defines a company as follows :—

Company defined.

"By a company is meant an association of many persons who contribute money or money's worth to a common stock, and employ it for some common purpose. The common stock so contributed is denoted in money and is the capital of the company. The persons who contribute it, or to whom it belongs, are *members*. The proportion of capital to which each member is entitled is his *share*. Shares are always transferable; although the right to transfer them is often more or less restricted" (*a*).

Difference between a company and a partnership.

The difference between an ordinary partnership and a company has been explained by James, L.J., thus (*b*) :—

"An ordinary partnership is a partnership composed of definite individuals bound together by contract between themselves to continue combined for some definite object, either during pleasure or during a limited time, and is essentially composed of the persons originally entering into the contract with one another. A company or association (which I take to be synonymous terms) is the result of an arrangement by which parties intend to form a partnership which is constantly changing, a partnership to-day consisting of certain members, and to-morrow consisting of some only of those members along with others who have come in, so that there will be a constant shifting of the partnership, a determination of the old and a creation of a new partnership, and with the intention that, so far as the partners can by agreement between themselves bring about such a result, the new partnership shall succeed to the assets and liabilities of the old partnership. This object, as regards liabilities, could not in point of law be attained by any

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(*a*) Lindley on Companies, p. 1. See *Reg.* v. *Registrar of Joint Stock Companies*, [1891] 2 Q. B. 598.

(*b*) *Smith* v. *Anderson* (1879), 15 Ch. D. 273.

arrangement between the persons themselves, unless the persons contracting with them authorised the change by a novation, or unless, by special provisions in Acts of Parliament, sanction was given to such arrangements."

It will be observed that a company as thus defined differs from an ordinary partnership in that any member of the company can transfer his share so as to enable the transferee to take his place in the company, whereas in an ordinary partnership no partner is at liberty without the consent of all the other partners to retire from the firm and substitute another person in his place as partner, and an assignment of his share does not entitle the assignee to become a partner (*c*).

Unincorporated companies.

But in most respects an unincorporated company may be regarded as being a mere private partnership, which, in English law (*d*), has no existence as a legal *persona* distinct from the members of the firm. Each partner is the agent of the others to contract on behalf of them all as to matters within the scope of the business (*e*), and creditors contract with the partners as individuals. It follows that every member of an unincorporated company is at common law personally liable, as a partner, without limit, for the whole of the debts contracted by the company while he is a member; and, as between the members, each has a right to make his co-partners contribute in proportion to their shares towards the payment of the partnership debts (*f*). But at common law one partner could not, as a rule, sue other partners for contribution (the proper remedy being to apply to a Court of equity to order an account), and in the case of unincorporated companies with a large number of members, it was practically impossible to

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(*c*) *Jefferys* v. *Smith* (1825), 3 Russ. 158; 27 R. R. 49; cf. *Byrne* v. *Reid*, [1902] 2 Ch. 735.

(*d*) In Scotch law a firm or partnership is a distinct legal *persona*. See Bell's Principles of the Law of Scotland, § 357, and the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 4 (2).

(*e*) *Oakes* v. *Turquand* (1867), L. R. 2 H. L. 358, per Ld Cranworth; *Ernest* v. *Nicholls* (1857), 6 H. L. C. 401, 417, per Ld. Wensleydale.

(*f*) Partnership Act, 1890, s. 24.

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obtain a dissolution or winding-up of the business and an adjustment of the rights of the members *inter se* (*g*). Now, however, under the Limited Partnerships Act, 1907, there may be partners whose liability is limited to the amount of capital contributed by them (*h*).

Corporation.

On the other hand, a corporation is, in the eye of the law, a person distinct from the "corporators," *i.e.*, the members for the time being of the corporation, and the rights and obligations of the corporation are not exercisable by or enforceable against its members; so that the only remedy of creditors of a corporation at common law is against the property of the corporation, and they have no rights against the separate property of any member of the corporation as such (*i*). Nor can a member of a corporation substitute another person as a corporator in place of himself without authority from charter or statute (*k*).

At common law, also, every association of persons formed in order to carry on and share the profits of a business must be either a partnership or a corporation (*l*); there is no *tertium quid* such as the modern incorporated joint stock company, of which the individual members, though liable personally for debts of the company, may yet be liable only to a limited amount, and not, like ordinary partners, without limit.

A corporation (*m*) may, at common law, be created either by Royal Charter or by Act of Parliament; but the Crown could not, in creating a corporation, impose

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(*g*) See, *e.g.*, *Van Sandau* v. *Moore* (1823), 1 Russ. 441, where a bill was filed against nearly 300 defendants; see the observations of Ld. Eldon, C., as to the history of joint stock companies, at pp. 458 *et seq.*, and 470 *et seq.*

(*h*) 7 Edw. 7, c. 24.

(*i*) "A corporation is a legal *persona* just as much as an individual; and, if a man trusts a corporation, he trusts that legal *persona*, and must look to its assets for payment: he can only call upon individual members to contribute in case the Act or charter has so provided," per Cave, J., *Re Sheffield Bdg. Soc.* (1889), 22 Q. B. D. 476. See the discussion of "Artificial Persons" in Pollock on Contract, Chap. II.

(*k*) See *ante*, p. 164.

(*l*) *Macintyre* v. *Connell* (1850), 1 Sim. (N.S.) 233.

(*m*) See Grant on Corporations.

any personal liability for its debts on the members of the corporation until, in 1826, a statute empowered it to do so (*n*).

Companies under letters patent.

In 1834 the Crown was enabled by statute (*o*) by means of letters patent to confer on a company certain privileges, such as the right of suing and being sued in the name of one of its officers, without incorporating it: and this may still be done under the Chartered Companies Acts, 1837 (*p*), which repealed both the Acts above referred to. Thus the Legislature obviated the inconvenient necessity of making all the members of an unincorporated company parties to actions by or against the company (*q*).

Company incorporated by special Act.

If a company was incorporated by special Act of Parliament without any express provision as to the liability of its members, they were not personally liable for any debts of the company; but such Acts sometimes provided that the members should be liable to the extent of the amounts unpaid on their shares (*r*).

Other statutes.

An Act of 1844 (*s*) enabled companies to obtain a certificate of incorporation without charter or special Act, and by an Act of 1855 (*t*) they might be incorporated under the Act of 1844 with limited liability. These Acts were repealed and replaced by the Joint Stock Companies Acts of 1856 and 1857 (*u*), by the Companies Act, 1862 (*x*), and subsequent statutes. All these were replaced in 1908 by the Companies Act of that year (*y*). Further legislation with reference to companies, amending the Act of 1908, took place in

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(*n*) 6 Geo. 4, c. 91.

(*o*) 4 & 5 Will. 4, c. 94.

(*p*) 7 Will. 4 & 1 Vict. c. 73, as explained by 47 & 48 Vict. c. 56.

(*q*) *Oakes* v. *Turquand* (1867), L. R. 2 H. L. 358.

(*r*) Lindley on Companies, 4.

(*s*) 7 & 8 Vict. c. 110. This was the first general Joint Stock Company Act. In the same year the 7 & 8 Vict. c. 113 obliged banking companies to be incorporated by charter only. See the sketch of these Acts by Ld. Cranworth, in L. R. 2 H. L. 359.

(*t*) 18 & 19 Vict. c. 133.

(*u*) 19 & 20 Vict. c. 47; 20 & 21 Vict. c. 14.

(*x*) 25 & 26 Vict. c. 89.

(*y*) 8 Edw. 7, c. 69.

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1913, 1917 and 1928 (*z*). The Companies Act, 1929 (*a*), now consolidates the law on the subject for the time being, but further legislation appears to be in contemplation.

Companies under Act of 1929;

The most important classes of modern companies are—(1) Joint stock companies, incorporated by registration under the Companies Acts, 1862 to 1929, and now governed by the Companies Act, 1929 (*b*). In these companies the name and objects of the company, the amount of its capital divided into shares of a certain fixed amount, and some other particulars are set forth in a memorandum of association signed, in the case of public companies, by at least seven, and in the case of "private companies," by at least two, subscribers (*c*);

under Companies Clauses Consolidation Act, 1845.

(2) Companies (*e.g.*, railway companies), incorporated by special Acts of Parliament and regulated by the Companies Clauses Consolidation Act, 1845 (*d*), and the amending Acts (*e*), which set forth usual provisions formerly inserted in special Acts incorporating joint stock companies for the execution of undertakings of a public nature, and provide that such provisions, save so far as they shall be expressly varied or excepted by any such special Act, shall apply to the company incorporated by such Act and to its undertaking, so far as they shall be applicable thereto (*f*). The special Act names the amount of the capital of the company, the number of shares into which it is to be divided, and the amount of each share.

Capital.

The word "capital," as has been pointed out by

(*z*) Companies Act, 1913; Companies (Foreign Interests) Act, 1917; Companies (Particulars as to Directors) Act, 1917; Companies Act, 1928.

(*a*) 19 & 20 Geo. 5, c. 23. References in the text to "the Act" are to the Act of 1929, unless otherwise specified.

(*b*) 19 & 20 Geo. 5, c. 23.

(*c*) S. 1.

(*d*) 8 & 9 Vict. c. 16.

(*e*) 26 & 27 Vict. c. 118; 32 & 33 Vict. c. 48; 47 & 48 Vict. c. 43; 51 & 52 Vict. c. 48; 52 & 53 Vict. c. 37; Wms. P. P., Pt. II., Chap. VI.

(*f*) 8 & 9 Vict. c. 16, s. 1.

Lord Lindley (*g*), is used in many senses, the idea underlying its various meanings in connection with a company being that of "money obtained or to be obtained for the purpose of commencing or extending a company's business, as distinguished from money earned in carrying on its business." So-called borrowed capital, or "loan capital," is neither more nor less than a debt from the company to the person or persons who lend it.

"Loan capital."

The "nominal capital" of a company is the sum which, by the special Act or charter, or memorandum of association, or other instrument by which the company is constituted, is authorised to be raised by the company, and it is generally by that instrument divided into a specified number of shares, each share being of a fixed amount. The "subscribed capital" or "issued capital" consists of so much of the nominal capital as is subscribed by persons who, by agreeing to take shares, become liable to pay to the company the amounts for which those shares have been created (*h*). The "paid-up capital" consists of such part of the subscribed capital as has been paid to the company or credited by the company as paid in respect of shares allotted and issued to the subscribers who become shareholders.

"Nominal capital."

"Subscribed capital," or "issued capital."

"Paid-up capital."

Frequently, on the formation of a company, an "underwriting" agreement is made, that is, an agreement entered into, before the shares are brought before the public, that in the event of the public not taking up the whole of them, or the number mentioned in the agreement, the underwriter will, for an agreed commission, take an allotment of such part of the shares as the public has not applied for. The payment of a commission is authorised by the Act (*i*), provided it is authorised by the articles of the company, disclosed in the prospectus or statement in lieu of a prospectus and

"Underwriting" shares.

(*g*) Lindley on Companies, Bk. III., Chap. 3, s. 1.

(*h*) Per Fry, L.J., *Re Almada Co.* (1887), 38 Ch. D. 424.

(*i*) S. 43.

the amount stated in every balance sheet issued by the company.

Contract to take shares.

A contract to take shares to be issued by a company is constituted by an application to the company for, or an offer to take, the shares, accepted by an allotment of shares to the applicant; but there is no complete contract until the fact of the allotment is communicated to the applicant (*k*), for the acceptance of an offer must on general principles be communicated. The posting of a letter of allotment, if effected in the regular course of business, will be deemed a communication to the applicant, even though through some miscarriage in the post, it is not delivered (*l*).

Contract to purchase shares.

The nature of a contract to purchase shares, already issued in a going company, from the holder of the shares differs from that of a contract to purchase goods or chattels. It is in effect a contract by the buyer to enter into an association already formed, taking his share of past liabilities and his chance of future profits or losses. He has not bought any chattel or piece of property for himself; he has merged himself in a society, to the property of which he has agreed to contribute (to the amount, if any, unpaid on the shares), and the property of which, including his own contributions, he has agreed shall be used and applied in a particular way and in no other way (*m*).

"Uncalled capital."

Shares in a company are frequently issued not fully paid up, and in such cases the unpaid part of the shares has to be paid when demanded or "called up" at the times required by the constitution of the company. Moneys so payable in respect of shares are often described as "uncalled capital," and, when payment of them is

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(*k*) *Gunn's Case* (1867), 3 Ch. 40; *Robinson's Case* (1869), 4 Ch. 322.

(*l*) See *Household Ins. Co.* v. *Grant* (1879), 4 Ex. D. 216; *Re London and Northern Bank, Ex p. Jones*, [1900] 1 Ch. 220.

(*m*) Per Cairns, C., *Houldsworth* v. *Glasgow Bank* (1880), 5 App. Cas. 324; per Ld. Hatherley, *ib.* 332, per Ld. Blackburn, *ib.* 337, as to the nature of a contract to take shares.

demanded by the proper authority, as "calls" (*n*). It sometimes happens that, when the shares are fully paid up, they are turned into "stock" (*o*). The distinction between shares and stock is that shares cannot be transferred in fractional parts, but stock can (*p*). Stock cannot be created as partly paid up (*q*).

"Stock."

When the original shares in a company are subscribed, it is the practice to issue to each subscriber documents called "scrip certificates," or, for brevity, "scrip," stating that he, or more commonly "the holder" of the scrip, is entitled to so many shares on which £—— have been paid. The scrip confers on the person named in it the right to acquire, but does not impose on him any obligation to accept the shares; and, as a general rule, the scrip-holder does not acquire the rights of a shareholder until his scrip is exchanged for shares.

Scrip.

Prima facie scrip is not negotiable, but it may be proved to be negotiable by mercantile usage in any particular case; and, even if it is not, the true owner may by his own conduct preclude himself from denying that it is transferable by delivery to a *bona fide* holder for value (*r*).

In the absence of any provision for management of a company's business, it would seem that the majority of its shareholders must determine how it is to be conducted (*s*); but it is generally provided that the management shall be entrusted to directors, who are the servants, not of individual shareholders, but of the

Management of company —directors.

(*n*) See Lindley on Companies, Bk. III., Chap. 3. s. 2 (1), as to what is the proper authority; and *Re Pyle Works* (1890), 44 Ch. D. 583, *post*, p. 338, that it is a matter to be regulated by the articles of association until there is a winding-up, when the liquidator is the person to make calls.

(*o*) See Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 61; Companies Act, 1929, ss. 50-52.

(*p*) See *Morrice* v. *Aylmer* (1875), 10 Ch. 148; L. R. 7 H. L. 717.

(*q*) *Re Home and Foreign Investment Co.*, [1912] 1 Ch. 72.

(*r*) See *ante*, pp. 191-2. *Rumball* v. *Metropolitan Bank* (1877), 2 Q. B. D. 194.

(*s*) Lindley on Companies, Bk. III., Chap. 1, s. 1.

company (*t*); they are not trustees for individual shareholders (*u*).

A company which is neither incorporated nor privileged by the Crown (*x*) or by statute is, as we have said, substantially a partnership; but an incorporated company is, in a legal point of view, distinct from its members, and its existence is not affected by changes among them.

The history of the law relating to companies will be found in Lindley on Companies (*y*). We shall here confine our attention to—

(1) Companies regulated by a special Act of Parliament incorporating the Companies Clauses Consolidation Act, 1845 (*z*);

(2) Companies regulated by the Companies Act, 1929.

Companies incorporated under special Acts.

(1) Where a company is incorporated by a special Act of Parliament, the members of the company are not partners, and their liability in respect of the debts of the company depends upon the provisions of the special Act. In the absence of express provision, the members are not personally liable for the debts of the company, except in respect of moneys unpaid on their shares (*a*). It is the practice to incorporate the Companies Clauses Consolidation Acts, 1845 to 1889 (*b*) (sometimes with variations or exceptions), in the special Act.

Companies Clauses Consolidation Act, 1845.

The Companies Clauses Consolidation Act, 1845, assumes that the company is incorporated by a special Act by which the amount of nominal capital and the

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(*t*) *Ib.* As to the position and functions of directors, see Lord Selborne in *G. E. R.* v. *Turner* (1872), 8 Ch. App. 149, at p. 152; *Re Faure Co.* (1888), 40 Ch. D. 141; *Re Sharpe*, [1892] 1 Ch. 167; *Dovey* v. *Cory*, [1901] A. C. 477.

(*u*) *Percival* v. *Wright*, [1902] 2 Ch. 421.

(*x*) *I.e.*, companies formed under 7 Will. 4 & 1 Vict. c. 73.

(*y*) Introduction, p. 2. See also Palmer's Company Law, Chap. I., and Historical Foundations of Modern Company Law, by R. R. Formoy. Stiebel's Company Law Precedents (ed. 2), Vol. I, Chap. I.

(*z*) 8 & 9 Vict. c. 16.

(*a*) See *post*, p. 324.

(*b*) 8 & 9 Vict. c. 16; 26 & 27 Vict. c. 118; 32 & 33 Vict. c. 48; 51 & 52 Vict. c. 48; and 52 & 53 Vict. c. 37.

number and amounts of the shares are prescribed. The Act provides that the shares are to be numbered regularly from one upwards, so that each share shall be distinguished by its own number (*c*). The company is to keep a book called the "Register of Shareholders," authenticated by the common seal of the company (*d*), containing the names and addresses of the shareholders, the number of shares to which each is entitled, the distinguishing numbers of the shares and the amount of the subscriptions paid on them (*e*). The register of shareholders is *prima facie* evidence against a person registered in it as a shareholder that he is such in fact (*f*). On demand of any shareholder, and on payment of a small fee, the company is required to deliver to him a certificate of membership, which is *prima facie* evidence of his legal (*g*) title to the shares mentioned in it (*h*). By issuing a certificate, the company may be estopped from denying the title of the person therein named to the shares (*i*).

Register of shareholders.

It should be observed that a person may be a shareholder though his name be not on the register of shareholders, as where the special Act names him as a director and requires each director to hold shares (*k*); and that if the name of a person is improperly put on the register, the onus lies on him of showing that he is not a shareholder, which he can do by showing that his name was placed on the register without his express or implied authority (*l*).

Register not conclusive.

Where the register is incorrect, the company can be compelled by mandamus or injunction respectively to insert the name of a person who has a right to be on

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(*c*) Act of 1845, s. 6.

(*d*) Where the register is contained in several volumes, it suffices if the seal is affixed to the last of them only; *Knight* v. *G. N. R. Co.* (1851), 1 Macq. 112.

(*e*) Act of 1845, s. 9.

(*f*) *Ib.* s. 28.

(*g*) *Shropshire Union R. Co.* v. *Reg.* (1874), L. R. 7 H. L. 496.

(*h*) Act of 1845, ss. 11, 12.

(*i*) *Balkis Co.* v. *Tomkinson*, [1893] A. C. 396; *post*, pp. 335-6.

(*k*) *Portal* v. *Emmens* (1876), 1 C. P. D. 201, 664; *post*, p. 346.

(*l*) Lindley on Companies, Bk. I., Chap. 2, s. 3.

the register, or to strike out the name of a person who has been improperly placed on it.

Transfer of shares.

The shares are transferable by deed, which may be in the form prescribed by the Act or to the like effect, and must be delivered to the secretary of the company (*m*), who keeps it and enters a memorial in a book called " the Register of Transfer " (*n*). In cases where the interest in any share is transmitted owing to the death or bankruptcy of a shareholder (formerly by the marriage of a female shareholder), or by any other lawful means, the transmission is to be authenticated by a declaration made in the prescribed manner and left with the secretary, who is to enter the name of the person entitled by such transmission on the register of shareholders (*o*).

Trusts.

The company is not bound to see to the execution of any trust, whether express, implied or constructive, to which any of the shares may be subject (*p*).

Remedy of creditors of company.

The creditors of a company governed by the Companies Clauses Acts are not entitled to proceed against the shareholders personally if payment can be obtained from the company (*q*).

Where execution is issued against the property of the company, and " there cannot be found sufficient whereon to levy such execution," execution may be issued against any shareholder to the amount unpaid on his shares (*r*), even though he is not registered as a shareholder (*s*), on the creditor obtaining leave to issue execution (*t*).

The Companies Act, 1929.

(2) Companies incorporated under special Acts, and regulated, as above described, by the Companies Clauses

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(*m*) *Nanney* v. *Morgan* (1887), 37 Ch. D. 346; *Roots* v. *Williamson* (1888), 38 *id.* 485, 494.

(*n*) Act of 1845, ss. 14, 15; *Nanney* v. *Morgan*, *sup.*

(*o*) Act of 1845, ss. 18, 19. See as to the position of executors or administrators of a shareholder, *Barton* v. *N. Staff. R. Co.* (1888), 38 Ch. D. 458; *Barton* v. *L. & N. W. R. Co.* (1890), 24 Q. B. D. 77.

(*p*) Act of 1845, s. 20.

(*q*) Lindley on Companies, Bk. II., Chap. 6, s. 2.

(*r*) Act of 1845, s. 36. Lindley on Companies, Bk. II., Chap. 6, s. 3.

(*s*) *Portal* v. *Emmens* (1876), 1 C. P. D. 201, 664. *Ante*, p. 323.

(*t*) R. S. C., Ord. XLII., r. 23.

Acts, must be carefully distinguished from joint stock companies incorporated by registration under the Companies Act, 1929 (*u*), and regulated by that Act, which we now proceed to consider.

The Companies Act, 1862 (*x*), repealed the Joint Stock Companies Act, 1844 (*y*), and fifteen other Acts passed in that and subsequent years for the regulation and winding-up of joint stock companies, including banking companies. It was frequently amended and extended by various Acts, passed between 1862 and 1907, dealing with companies registered under it. In 1908 the Companies (Consolidation) Act, 1908 (*z*), was passed, which repealed the whole of the Companies Acts, 1862 to 1907, and sect. 10 of the Judicature Act, 1875 (*a*), so far as it related to companies. This Act was made the subject of further amendments between 1913 and 1928 (*b*), and another consolidating Act was passed in 1929, which now constitutes a code of company law for companies to which it applies.

Registration necessary.

The Act of 1929 (*c*) forbids the formation of a company, association, or partnership, consisting of more than ten persons, for the purpose of carrying on the business of banking, and of more than twenty for the purpose of carrying on any other business for gain, unless it is registered under that Act, or incorporated by Act of Parliament or letters patent, or is a mining company within the Stannaries, and subject to the Stannaries jurisdiction.

Object of the Act.

With regard to the similar provisions of the Act of 1862, it was said that "the Act was intended to prevent the mischief arising from large trading undertakings being carried on by large fluctuating bodies, so that persons dealing with them did not know with whom

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(*u*) 19 & 20 Geo. 5, c. 23.

(*x*) 25 & 26 Vict. c. 89.

(*y*) *Ante*, p. 317.

(*z*) 8 Edw. 7, c. 69.

(*a*) 38 & 39 Vict. c. 77.

(*b*) See *ante*, pp. 317-8.

(*c*) Ss. 357 and 358. See *R.* v. *Tankard*, [1894] 1 Q. B. 548. Insurance companies are also regulated by the Assurance Companies Act, 1909 (9 Edw. 7, c. 49).

they were contracting, and so might be put to great difficulty and expense, which was a public mischief to be repressed" (*d*); and "the object of the Act was that commercial associations or companies consisting of more than twenty members should be registered" (*e*), and to clothe a large partnership with something in the shape of a corporate capacity (*f*).

Companies to which Act applies.

The Act of 1929 applies not only to companies formed under it, but also, in part, to companies which were formed or registered under the repealed Acts of 1862 and 1908, or the Joint Stock Companies Acts (*g*), and, as regards winding-up, to unregistered companies, including any partnership, association or company (not being foreign) consisting of not less than eight members, and to a trustee savings bank (*h*). Previously existing companies may, with certain exceptions, register under the Act, and may do so even with a view to the company being wound up (*i*).

Every company incorporated outside the United Kingdom which establishes a place of business within it must file certain particulars with the Registrar of Companies and comply with certain requirements (*k*). Companies incorporated in British possessions, on filing certain particulars, are empowered to hold land in the United Kingdom (*l*).

Memorandum of association.

Under the Act seven or more persons, or, in the case of a "private company," two persons associated for any lawful purpose may, by subscribing their names to a memorandum of association and registering it (and also the articles of association, if any), form an incorporated company with or without limited liability (*m*). The

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(*d*) Per James, L.J., *Smith* v. *Anderson* (1879), 15 Ch. D. 273.

(*e*) Per Jessel, M.R., *Re Padstow Assocn.* (1882), 20 Ch. D. 145.

(*f*) Per Giffard, L.J., *Re General Co. of Land Credit* (1870), 5 Ch. 377.

(*g*) Part VIII. This Part is not to apply to companies registered in the Irish Free State or Northern Ireland.

(*h*) Part X.

(*i*) Part IX.

(*k*) Part XI., ss. 344, 346—348.

(*l*) S. 345.

(*m*) S. 1.

memorandum must contain the prescribed statements (*n*), of which the most important are the objects for which the company is to be established, for thereby are its powers limited (*o*), and whether the liability of its members is limited, and to what extent.

Registration.

Upon registration being duly made, the registrar of joint stock companies certifies that the company is incorporated, and in the case of a limited company that the company is limited, and from the date of incorporation mentioned in the certificate the subscribers of the memorandum of association, together with such other persons as from time to time become members of the company, become a body corporate by the name contained in the memorandum, having perpetual succession and a common seal, with power to hold lands (*p*).

The certificate of the registrar in respect of any association is conclusive evidence that all the requirements of the Act as to registration and matters precedent and incidental thereto have been complied with; and that the association is a company authorised to be registered and duly registered under the Act (*q*).

"One man company."

If the requirements of the statute have been complied with, the company becomes a valid legal corporation having a legal existence apart from the individual shareholders; and this is so, although there may be but seven shareholders, all members of one family, and the company has been formed for the purpose of taking over and carrying on the business of one of the seven shareholders who holds nearly all the shares (*r*).

Liability of members.

The extent of the liability of the members of a company under the Act must be defined by the memorandum.

(*n*) S. 2.

(*o*) See per Ld. Cairns in *Ashbury Co.* v. *Riche* (1874), L. R. 7 H. L. 668; *Ashbury* v. *Watson* (1885), 30 Ch. D. 376. See *post*, pp. 336-7.

(*p*) Ss. 13 and 14. As to the effect of incorporation, see per Lindley, L.J., in *Ryhope Co.* v. *Foyer* (1881), 7 Q. B. D. 498.

(*q*) S. 15. See *Oakes* v. *Turquand* (1867), L. R. 2 H. L. 354.

(*r*) *Salomon* v. *Salomon & Co.*, [1897] A. C. 22. See also *Farrar* v. *Farrars, Ltd.* (1888), 40 Ch. D. 395. Cf. *Daimler Co.* v. *Continental Tyre, etc., Co.*, [1916] 2 A. C. 307.

It may be unlimited, in which case the company is called an unlimited company, or it may be limited either to the amount, if any, unpaid on the shares, when it is called a company limited by shares, or to such amount as the members may undertake by the memorandum to contribute to the assets of the company in the event of its being wound up (*s*), in which case it is called a company "limited by guarantee." No company having the liability of its members limited by letters patent or Act of Parliament can register as an unlimited company, or as a company limited by guarantee (*t*); and a company whose capital is not divided into shares of a fixed amount or held and transferable as stock cannot register as a company limited by shares (*u*). It should be added that an unlimited company may limit its liability on a contract by expressly stipulating that the funds only of the company shall be answerable, and that no member shall be liable beyond the amount of his share; and that an unlimited company may register as a limited company (*x*).

In companies where the liability of the members is limited, that of the directors or managers, or managing director, may be unlimited, if so provided by the memorandum (*y*).

Companies not formed for gain.

An association about to be formed as a limited company, if it proves to the Board of Trade that it is formed for the purpose of promoting commerce, art, science, religion, charity, or any other useful object, and that it is the intention of such association to apply the profits, if any, or other income of the association, in promoting its objects, and to prohibit the payment of any dividend to its members, may be registered with limited liability without the addition of the word "limited" to its name (*z*). Such a company cannot hold more than two

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(*s*) S. 2 (3).
(*t*) S. 321 (1) (iii).
(*u*) Ss. 321 (1) (iv), 322.
(*x*) Ss. 16, 53, 333 (4).
(*y*) Ss. 146, 147.
(*z*) S. 18. *Re St. Hilda's College*, [1901] 1 Ch. 556.

acres of land without the licence of the Board of Trade (*a*).

Prohibition against carrying on business with less than minimum number of members.

If a company carries on business when the number of its members is less than seven, or in the case of a private company than two, for a period of six months after the number has been so reduced, every person who is a member of the company during the time that it carries on business after such period of six months, and is cognisant of the fact that it is so carrying on the business with too few members, will be severally liable and may be separately sued for the payment of the whole debts of the company contracted during such time (*b*).

Articles of association.

In the case of a company limited by shares there may be, and, in the case of a company limited by guarantee or unlimited, there must be, registered, with the memorandum, articles of association signed by the subscribers to the memorandum, prescribing regulations for the company (*c*). In the former case, if the memorandum is not accompanied by articles, or in so far as the articles do not exclude or modify the regulations in Table A. in the first schedule to the Act, such regulations, so far as applicable, are to be the regulations of the company (*d*).

The function of the articles of association is to regulate the administration and internal affairs of the company.

The memorandum of association " is, as it were, the charter, and defines the limitation of the powers of the company. With regard to the articles of association, these articles play a part subsidiary to the memorandum. They accept the memorandum of association as the charter of the company, and, so accepting it, the articles proceed to define the duties, the rights, and the powers of the governing body as between themselves and the company at large, and the mode and form in which the business of the company is to be carried on, and the mode and form in which changes in the internal regulations of the company may from time to time be made " (*e*).

(*a*) S. 14.

(*b*) S. 28.

(*c*) S. 6.

(*d*) S. 8 (2).

(*e*) Per Ld. Cairns, *Ashbury Co.* v. *Riche* (1874), L. R. 7 H. L. 668.

In respect of all matters which the Act requires to be in the memorandum, the articles cannot be looked at in order to modify the memorandum, which is the dominant instrument (*f*). In respect, however, of matters not required by law to be stated in the memorandum, the memorandum and articles, being contemporaneous documents, may be read together; and, if they can be read in two ways, the construction will be preferred which renders them consistent, and if one is clear and the other ambiguous, the former will be used to interpret the latter (*g*).

When registered, the memorandum and articles of a company bind it and its members as if they had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and articles, subject to the provisions of the Act (*h*).

General meeting.

A general meeting must be held once in every calendar year, and the interval between general meetings must not be more than fifteen months (*i*). A first general meeting must be held within not less than one or more than three months from the date at which the company is entitled to commence business (*k*). This is called "the statutory meeting," and before it is held the "statutory report," which supplies information in regard to the shares and capital of the company, must be sent to each shareholder (*k*).

Resolutions.

As to matters within the powers of the company, the company is, generally speaking, bound by an ordinary resolution of a majority of members present at a duly convened meeting (*l*); and an ordinary resolution may be that of a simple majority of those present, unless the

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(*f*) Per Bowen, L.J., *Guinness* v. *Land Corp. of Ireland* (1883), 22 Ch. D. 381.

(*g*) Per Jessel, M.R., *Re Phœnix, &c. Steel Co.* (1875), 44 L. J. Ch. 683; *Re Pyle Works* (1890), 44 Ch. D. 534.

(*h*) S. 20 (1).

(*i*) S. 112.

(*k*) S. 113.

(*l*) *N. W. Transportation Co.* v. *Beatty* (1887), 12 App. Cas. 593.

regulations of the company prescribe otherwise. But when a resolution is inconsistent with the articles, it is invalid unless confirmed by a special resolution (*m*). In some cases, either by statute or under the articles of association, "extraordinary" or "special" resolutions are necessary.

"Extraordinary" and "special" resolution.

An extraordinary resolution is one passed by a majority of not less than three-fourths of the members entitled to vote who are present in person or by proxy (where proxies are allowed) at a general meeting, of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given (*n*). A "special resolution" is one passed in the same manner as an "extraordinary" resolution at a general meeting, of which not less than twenty-one days' notice specifying the intention to propose the resolution as a special resolution has been duly given (*o*).

Alteration of articles.

The regulations or articles of association may, subject to the provisions of the Act and of the memorandum, be altered or added to by special resolution (*p*). Thus a company may by special resolution alter its articles so as to enable the directors to issue preference shares by way of increase of capital, though neither the articles nor memorandum authorise any preference among shareholders (*q*). But a company cannot by altering its articles alter the contractual rights or liabilities of other persons (*r*), unless the contract was made on the assumption that such a power was possessed by the company and might be exercised. Nor will an alteration be allowed which would operate oppressively or inequitably on the interests of a dissentient minority of the shareholders (*s*). The test appears to be whether the

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(*m*) *Quin and Axtens, Ltd.* v. *Salmon*, [1909] A. C. 442.
(*n*) S. 117 (1).
(*o*) S. 117 (2).
(*p*) S. 10. *Malleson* v. *Nat. Insurance Corp.*, [1894] 1 Ch. 200.
(*q*) *Andrews* v. *Gas Meter Co.*, [1897] 1 Ch. 361.
(*r*) *British Equitable Ass. Co.* v. *Baily*, [1906] A. C. 35.
(*s*) *Brown* v. *British Abrasive Wheel Co.*, [1919] 1 Ch. 290; *Dafen Tinplate Co.* v. *Llanelly Steel Co.*, [1920] 2 Ch. 124; *Shuttleworth* v. *Cox Bros. & Co., Ltd.*, [1927] 2 K. B. 9. But see *Sidebottom* v. *Kershaw, Leese & Co.*, [1920] 1 Ch. 154.

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alteration is *bona fide* for the benefit of the business of the company as distinct from the individual interests of the shareholders (*s*).

Prospectus.

It is usual on the formation of a company, or on the issue of further capital, to issue a prospectus. Before issue, a prospectus (*t*) must be dated, signed by every director or proposed director, and registered (*u*); it must state all the particulars prescribed by the Act, which include the names and addresses of the vendors of property to the company, the particulars of every material contract, the nature and extent of the interest of every director in the promotion of or in the property to be acquired by the company, and the minimum subscription on which the directors may proceed to allotment (*x*). A company, except a "private company," which does not issue a prospectus on its formation must before proceeding to allotment register a statement containing the prescribed particulars (*y*).

Statement in lieu of prospectus.

Untrue statements in.

Every director, and every person who with his authority is named in the prospectus as a director or intending director, and every promoter and person who has authorised the issue of the prospectus, may be made liable to pay compensation in respect of untrue statements therein to any person who has subscribed for shares or debentures on the faith of the prospectus unless he is able to prove certain facts, set out in detail in the Act, showing that the untrue statements were made without his knowledge or consent, or that he had reasonable ground to believe in their truth, or that on becoming aware of any untrue statement he took reasonable steps to give public notice disclaiming responsibility for such statement (*z*).

Allotment of shares.

The shares of a company, other than a private company, first offered to the public for subscription may not

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(*s*) See note (*s*), p. 331, *ante*.
(*t*) For definition of "prospectus," see s. 380.
(*u*) S. 34.
(*x*) S. 35 and Fourth Schedule to the Act.
(*y*) S. 40 and Fifth Schedule to the Act.
(*z*) S. 37. See *Adams* v. *Thrift*, [1915] 2 Ch. 21.

be allotted unless the whole amount offered, or the amount fixed by the articles and named in the prospectus as the minimum subscription which the directors require for preliminary expenses, working capital and other matters essential to the flotation of the company, has been subscribed, and the amount payable on application, being not less than five per cent. of the nominal amount of the shares, has been paid in cash (*a*). Until these and certain other conditions have been complied with the company may not commence business or exercise borrowing powers (*b*). If any allotment has been made in contravention of these conditions, it is voidable at the instance of the applicant within a month after the holding of the statutory meeting (*c*); and the directors may be liable to compensate the company and the allottee for any loss (*c*).

Directors.

Ordinary administrative matters are transacted by the directors or persons occupying that position (*d*). If they exceed their authority their acts may bind the company in favour of third parties dealing with them in good faith (*e*), unless their acts are clearly inconsistent with the regulations of the company. Persons dealing with them are not bound to inquire into the regularity of the "indoor management" (*f*). Such acts may be ratified by a majority of the members of the company (*g*), on the ground that in matters of internal management the proper tribunal to decide disputes is a general meeting of the shareholders. But if acts of the directors are *ultra vires* of the company itself, *e.g.*, not within the powers given by the memorandum of association, they do not bind the company, and the unanimous consent of all the members cannot validate them, and

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(*a*) S. 39. Part I. (5) of Fourth Schedule to the Act.
(*b*) S. 94.
(*c*) S. 41. *Ante*, p. 330.
(*d*) Lindley on Companies (ed. 6), Bk. II., Chap. 2, s. 1.
(*e*) *Re Bank of Syria*, [1900] 2 Ch. 272; [1901] 1 Ch. 115.
(*f*) *Royal British Bank* v. *Turquand* (1856), 6 E. & B. 327.
(*g*) See *Foss* v. *Harbottle* (1842), 2 Hare, 461; 62 R. R. 185

any one dissentient shareholder may take proceedings to restrain such acts (*h*).

Breach of trust by directors.

Directors are, with regard to the money and property of the company, in the position of trustees for the company (*i*), and may be made liable to account for any benefit obtained by themselves or for any loss accruing to the company through any breach of their trust (*k*). Under the Act (*l*), a director or other officer of a company which is being wound up may be ordered by the Court to repay money or restore property which he has misapplied or retained, or for which he has become liable or accountable (*m*).

Actions by shareholders against directors or company.

The rule (known as the rule in *Foss* v. *Harbottle* (*n*)) is that nothing connected with internal disputes between the shareholders is to be made the subject of an action by some one shareholder on behalf of himself and others, unless there be something illegal, oppressive or fraudulent—unless there be something *ultra vires* on the part of the company *qua* company, or on the part of the majority of the company, so that they are not fit persons to determine it (*o*); but that litigation must be in the name of the company if the company really desire it (*o*), subject to certain exceptions, as where a fraud is committed by persons who can command a majority of votes, in which case the minority can sue (*p*).

(*h*) *Salomons* v. *Laing* (1850), 12 Beav. 339; *Ashbury Railway Carriage Co.* v. *Riche* (1874), 7 H. L. 653; *Guinness* v. *Land Corporation of Ireland* (1883), 22 Ch. D. 349.

(*i*) *G. E. R.* v. *Turner* (1872), 8 Ch. App. 149; *Re Forest of Dean Mining Co.* (1879), 10 Ch. D. 450; *Re Faure Electric Co.*, 40 Ch. D. 141; *Sheffield Society* v. *Aizlewood*, 44 Ch. D. 452; *Re Sharpe*, [1892] 1 Ch. 154.

(*k*) *Re Sharpe*, *sup.*; *Re Lands Allot. Co.*, [1894] 1 Ch. 616; *Alexander* v. *Automatic Co.*, [1900] 2 Ch. 56.

(*l*) S. 276.

(*m*) See *Re New Mashonaland Co.*, [1892] 3 Ch. 577; *Dovey* v. *Cory*, [1901] A. C. 477; *Prefontaine* v. *Grenier*, [1907] A. C. 101; *Re City Equitable Fire Insurance Co.*, [1925] Ch. 407. See *post*, p. 347.

(*n*) *Sup.*

(*o*) Per James, L.J., *MacDougall* v. *Gardiner* (1875), 1 Ch. D. 13, 21.

(*p*) Per Jessel, M.R., *Mason* v. *Harris* (1878), 11 Ch. D. 107; *Spokes* v. *Grosvenor Hotel Co.*, [1897] 2 Q. B. 124.

Shares.

The shares or other interest of any member are personal estate, transferable as provided by the regulations of the company; and each share, where the capital is divided into shares, must be distinguished by its appropriate number (*q*). A register of members must be kept (*r*); and no notice of any trust shall be entered in the register (*s*). A certificate under the common seal of the company, specifying any shares or stock held by any member, is *prima facie* evidence of his title (*t*).

Certificate.

Transfer.

It will be observed that transfer is not, as under the Companies Clauses Consolidation Act, required to be by deed (*u*). Table A provides that shares shall be transferred in the form therein set out or in any usual or common form which the directors may approve, and that the instrument of transfer shall be executed both by the transferor and transferee, and that the transferor shall be deemed to remain a holder of such share until the name of the transferee is entered in the register of members (*x*). It also gives to the directors a discretion to decline to register any transfer of shares not fully paid to any person of whom they do not approve, or of any shares on which the company has a lien (*y*).

The directors of a company may refuse to register a transfer for sufficient reason (*z*), or without giving reasons if they act *bona fide* (*a*). A registered transfer made to a man of straw for the purpose of escaping liability on the shares may be valid if it is in fact an absolute transfer without any obligation on the part of the transferor to indemnify the transferee (*b*).

Estoppel.

If a company registers a forged transfer, it can be compelled to re-register the true owner of the shares (*c*);

(*q*) S. 62.
(*r*) S. 95.
(*s*) S. 101.
(*t*) S. 68. See Table A, Art. 4.
(*u*) See *ante*, p. 324
(*x*) *Ib.*, Arts. 17, 18.
(*y*) Art. 19.
(*z*) *Maynard* v. *Consolidated Kent Corp.*, [1903] 2 K. B. 121.
(*a*) *Re Coalport China Co.*, [1895] 2 Ch. 404.
(*b*) *Lindlar's Case*, [1910] 1 Ch. 207.
(*c*) *Barton* v. *L. & N. W. R. Co.* (1888), 38 Ch. D. 144, 149.

and the company may be liable to compensate the innocent transferee if he has altered his position on the faith of a certificate issued to him (*d*). The company will be estopped from denying the title of a transferee from a person to whom it has issued a share certificate, and will be liable in damages for refusal to register such transferee (*e*); and a certificate stating that shares are fully paid will estop the company from alleging that they have not been paid up (*f*).

Forged Transfers Acts.

By the Forged Transfers Acts, 1891 and 1892 (*g*), a company has power to pay compensation out of its funds for any loss arising from a transfer of shares in pursuance of a forged transfer.

Leeman's Act, 1867.

In order to prevent contracts for the sale and purchase of shares and stock in joint stock banking companies, of which the sellers are not possessed, or over which they have no control, an Act, commonly called Leeman's Act, was passed in 1867 (*h*), making void all such contracts which do not specify the distinguishing numbers of such shares or stock, or, if there are no distinguishing numbers, the person or persons in whose name or names the same then stand registered. Dealers on the Stock Exchange have disregarded this Act as impracticable, at the risk of incurring personal liability; but it has been held that the usage of the Stock Exchange to disregard the Act is unreasonable, and not binding on strangers who do not know of such usage (*i*); and, by disregarding the Act, a stockbroker may render himself liable for a breach of duty in not making a valid contract (*k*).

Alteration of memorandum.

A company may alter its memorandum of association

(*d*) *Balkis Co.* v. *Tomkinson*, [1891] 2 Q. B. 614; [1893] A. C. 396; *Dixon* v. *Kennaway*, [1900] 1 Ch. 833.

(*e*) *Re Ottos Co.*, [1893] 1 Ch. 618.

(*f*) *Bloomenthal* v. *Ford*, [1897] A. C. 162; *Re Coasters, Lim.*, [1911] 1 Ch. 86.

(*g*) 54 & 55 Vict. c. 43; 55 & 56 Vict. c. 36.

(*h*) 30 & 31 Vict. c. 29.

(*i*) *Perry* v. *Barnett* (1884), 15 Q. B. D. 388; *Seymour* v. *Bridge* (1885), 14 Q. B. D. 460. See *Loring* v. *Davis* (1886), 32 Ch. D. 625.

(*k*) *Neilson* v. *James* (1882), 9 Q. B. D. 546.

in respect to its objects by a special resolution, subject to confirmation by order of Court, so far as may be required to enable it (i) to carry on its business more economically or more efficiently; or (ii) to attain its main purpose by new or improved means; or (iii) to enlarge or change the local area of its operations; or (iv) to carry on some business which may conveniently or advantageously be combined with the business of the company; or (v) to restrict or abandon any of its objects; or (vi) to sell or dispose of the whole or any part of its undertaking; or (vii) to amalgamate with any other company or body of persons. The Court before confirming the alteration will see that sufficient notice has been given to debenture-holders and any persons affected by it, and that creditors entitled to object are protected (*l*).

Alteration of share capital.

But no alteration in the memorandum or articles which increases the liability to contribute to the share capital of, or otherwise to pay money to, the company will be binding on existing members of the company unless they have agreed in writing to be bound thereby (*m*).

A company limited by shares or a company limited by guarantee and having a share capital, if so authorised by its articles, may alter the conditions of its memorandum, so as to (i) increase its share capital, or (ii) consolidate and divide its share capital into shares of larger amount, or (iii) convert its paid-up shares into stock, or reconvert that stock into paid-up shares, or (iv) sub-divide its shares, or (v) cancel unissued shares (*n*). It may also, by special resolution, if confirmed by an order of Court to be obtained after satisfying the Court that all creditors and others entitled to object have consented or that their claims have been

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(*l*) S. 5. *Re Cyclists' Touring Club*, [1907] 1 Ch. 269; *Re Parent Tyre Co.*, [1923] 2 Ch. 222. For cases on the subject, see Palmer, Company Law (ed. 13), pp. 73-76; Stiebel's Company Law and Precedents (ed. 2), Ch. VIII.

(*m*) S. 22.

(*n*) Ss. 50-52.

satisfied or properly secured, reduce its share capital in any way (*o*).

Calls.

The Act does not directly provide for the making of calls; that is left to the articles of association or regulations of the company (*p*). The power to make calls may be vested in a general meeting of the company; but it is usually given to a quorum of the directors. The articles of a company usually provide that the shares of members not paying calls shall after notice be forfeited (*q*).

Contracts to issue shares otherwise than for cash.

The general effect of the Act is to render each member liable to pay the full amount of his shares, and, in the case of unlimited companies and companies limited by guarantee, a further sum in the event of a winding-up, but only in that event. This liability is in the nature of a specialty debt due to the company, accruing in respect of each share held from the time of its acquisition, and it is a liability which, in the case of limited companies, can only be discharged by payment in cash or money's worth (*r*).

It was decided that, under the Act of 1862, shares might be fully paid up in money's worth as well as in cash; but sect. 25 of the Act of 1867 provided that all shares should be deemed to be held subject to payment in full in cash unless otherwise determined by a written contract duly filed. This was found to involve considerable hardship occasionally in imposing liability on persons who had given full value for their shares and might be unaware that the provisions of the section had not been complied with by filing their contract. The section was consequently repealed by the Companies Act, 1908. Now the Act of 1929 provides (*s*) :—

> " Whenever a company limited by shares or a company limited by guarantee and having a share capital

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(*o*) Ss. 55-60.

(*p*) See Table A., Arts. 11-16.

(*q*) Table A., Arts. 23-29. See *New Balkis, Lim.* v. *Randt Gold Mining Co.*, [1904] A. C. 165.

(*r*) Ss. 20, 157, 159, 205-6. See per Lindley, L.J., *Re Pyle Works* (1890), 44 Ch. D. 582.

(*s*) S. 42.

> makes any allotment of its shares, the company shall within one month thereafter deliver to the registrar of companies for registration . . . (b) in the case of shares allotted as fully or partly paid up otherwise than in cash (*t*), a contract in writing constituting the title of the allottee to the allotment together with any contract of sale, or for services or other consideration in respect of which that allotment was made, . . . and a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been allotted."

Under this provision the company is bound to register the contract, and the officers are liable to a penalty for default in so doing (*u*); but failure to register does not prejudice the allottee.

Thus it can be ascertained by reference to the filed contracts how much of the capital has been issued for some consideration other than cash or a liability to pay cash, as, for example, where shares are issued as paid up to a vendor as the price of property sold to a company, or to a person in payment for services rendered to the company.

Issue of shares at discount.

Formerly it was not lawful for a company limited by shares to issue shares as fully paid up, at a discount, even though authorised by the articles of association (*x*); and the issue of debentures at a discount exchangeable at the option of the holder for fully paid shares of the nominal value of the debentures would be void as leading to this result (*y*). The whole nominal amount must be paid either in money or money's worth (*z*). If shares were issued at a discount, the shareholder was liable to pay the amount of the discount (*z*).

The Act of 1929, however, authorises the issue of shares at a discount where the shares are of a class already issued, provided that (i) the issue is authorised by resolution of the company and sanctioned by the

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(*t*) See *Re Johannesburg Hotel Co.*, [1891] 1 Ch. 119.

(*u*) S. 42.

(*x*) *Welton* v. *Saffery*, [1897] A. C. 299.

(*y*) *Mosely* v. *Koffyfontein Mines*, [1904] 2 Ch. 108.

(*z*) *Ooregum Co.* v. *Roper*, [1892] A. C. 125; *Re Eddystone Co.*, [1893] 3 Ch. 9; *Welton* v. *Saffery*, *sup.*

Court; (ii) the maximum rate of discount at which the shares are to be issued is specified in the resolution; (iii) at the date of issue not less than one year has elapsed since the date on which the company was entitled to commence business; and (iv) the shares to be issued at a discount must be issued within one month after the date on which the issue is sanctioned by the Court or within such extended time as the Court may allow. Particulars of discount issues must be contained in every prospectus relating to the issue of the shares and every balance sheet issued by the company subsequently (*a*). The issue of shares at a discount is therefore still unlawful on the formation of a new company and only allowed subject to strict safeguards after the company has been for at least a year entitled to carry on its business.

Commission, discount, brokerage.

No commission, discount or allowance for subscribing or agreeing to subscribe or procuring subscriptions for shares may be paid by a company, unless (i) the payment is authorised by the articles; (ii) the commission does not exceed 10 per cent. of the price at which the shares are issued or the amount or rate authorised by the articles, whichever is the less; and (iii) the amount or rate of the commission and the number of shares which persons have been invited to subscribe for are disclosed by the prospectus or statement in lieu thereof and in any circular inviting subscription for shares. A company may, however, pay lawful brokerage (*b*).

Uncalled capital.

A limited company may, by special resolution, declare that any portion of its capital, which has not been already called up, shall not be called up except in the event of and for the purpose of the company being wound up (*c*).

Share warrants.

If authorised by its regulations as originally framed, or as altered by special resolution, a company limited by shares may, with respect to any fully paid-up share or stock, issue under their seal a share warrant to bearer,

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(*a*) S. 47. (*b*) S. 43. (*c*) S. 49.

that is to say, a warrant transferable by delivery, stating that the bearer of the warrant is entitled to the share or shares or stock therein specified, and may provide by coupons or otherwise for the payment of the dividends thereon. Such a warrant entitles the bearer to the shares or stock specified in it, which may be transferred by the delivery of the warrant, and he is entitled to be registered as a member (*d*); but he is not a member of the company unless, and only so far as, it is so provided by the articles (*d*).

Private company.

The "private company" first received statutory recognition in the Companies Act, 1907 (*e*). The Act of 1929 defines the expression as a company which by its articles restricts the right to transfer its shares, limits the number of its members (exclusive of present or past employees) to fifty, and prohibits any invitation to the public to subscribe for its shares or debentures (*f*).

Private companies are free from many of the restrictions and conditions applicable to public companies. A private company may be formed by two persons (*g*). It is exempt from many of the conditions imposed on public companies preliminary to commencing business (*h*). It need not include a copy of its last balance sheet in the annual return required to be made to the Registrar of Companies (*i*), nor is it required to send a copy of every balance sheet to its members (*k*) although it must, like other companies, produce a profit and loss account and balance sheet each year at a general meeting of the company (*l*) and every member is entitled to a copy of the balance sheet and auditors' report on application for the same (*m*). It is also exempt from the obligation to call a "statutory meeting" and deliver a "statutory report" (*n*).

Winding-up and dissolution of companies.

With regard to the winding-up of incorporated companies, it must be borne in mind that at common law a

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(*d*) Ss. 70, 97, 141.

(*e*) 7 Edw. 7, c. 50.

(*f*) S. 26.

(*g*) S. 1.

(*h*) See ss. 34, 40, 140.

(*i*) Ss. 108, 110.

(*k*) S. 130 (1).

(*l*) S. 123.

(*m*) S. 130 (2).

(*n*) S. 113. *Ante*, p. 330.

corporation cannot be dissolved by the will of all its members, but only by the surrender or cancellation of its charter, or in such other way as may be prescribed by the Act of Parliament or other instrument under which it is constituted, or by a special Act of Parliament, or by the total loss of all its members (*o*).

The main objects of the modern enactments as to winding-up proceedings are to provide a method of effecting the dissolution of the company, and the due application of its assets in payment of its debts, and to compel the members to contribute such sums as may be required for that purpose, and for the adjustment of the rights of the members *inter se*.

By the Bankruptcy Act, 1914, reproducing a similar provision of the Act of 1883, incorporated companies cannot be made bankrupt (*p*).

Winding-up of unregistered companies.

Not only registered companies but any partnership, association or company (with certain exceptions) consisting of not less than eight members, though not registered, may be wound up under the Act (*q*).

Effect of winding-up.

The primary intention of the Legislature in the provisions relating to the winding-up of companies is expressed in the Act (*r*) to be that "the property of the company shall be applied in the satisfaction of its liabilities, *pari passu*, and subject thereto shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company" (*s*).

Bankruptcy rules applicable;

In the winding-up of an insolvent company the same rules are to prevail and be observed with regard to the respective rights of secured and unsecured creditors, and to debts provable, and the valuation of future and contingent liabilities as under the law of bankruptcy with

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(*o*) See Lindley on Companies (ed. 6), 821.

(*p*) 4 & 5 Geo. 5, c. 59, s. 126, re-enacting 46 & 47 Vict. c. 52, s. 123. Apparently an unincorporated company might be adjudicated bankrupt; Lindley on Companies, 822.

(*q*) Ss. 337-342.

(*r*) S. 247.

(*s*) See *Birch* v. *Cropper* (1889), 14 App. Cas. 525; *Re Espuela Co.*, [1909] 2 Ch. 187.

respect to the estates of bankrupts (*t*); and anything which would, in the bankruptcy of an individual, be deemed a fraudulent preference is to be deemed to be the same in the winding-up of a company (*u*). Crown debts (*x*), however, and to a certain extent rates, wages, and salaries, and sums payable under the Workmen's Compensation Act, the Widows,' Orphans' and Old Age Contributory Pensions Act, and the National Health and Unemployment Insurance Acts, are entitled to be paid in priority to all other debts (*y*).

fraudulent preference; preferential payments.

Winding-up by the Court.

A company may be wound up either (1) compulsorily by the Court; or (2) voluntarily; or (3) subject to the supervision of the Court (*z*).

A company may be wound up compulsorily by the Court under the following circumstances (*a*):—

(1.) If it has by special resolution (*b*) resolved that it be wound up by the Court:

(2.) If default is made in filing the statutory report or in holding the statutory meeting:

(3.) If it does not commence its business within a year from its incorporation, or suspends its business for a whole year:

(4.) If the number of members is reduced, in the case of a private company, below two, or, in the case of any other company, below seven:

(5.) If it is unable to pay its debts:

(6.) If the Court is of opinion that it is just and equitable that the company should be wound up (*c*).

Company unable to pay debts.

A company is deemed to be unable to pay its debts whenever a creditor (by assignment or otherwise) for an amount exceeding £50 has served on the company a demand for payment, and the company has for three

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(*t*) S. 262. See Chap. XVII.

(*u*) S. 265.

(*x*) *Re Henley & Co.* (1878), 9 Ch. D. 469.

(*y*) S. 264. See *post*, Chap. XVII.

(*z*) S. 156.

(*a*) S. 168. See Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 15.

(*b*) *Ante*, pp. 330-1.

(*c*) See *Re Suburban Hotel Co.* (1867), L. R. 2 Ch. 737. *E.g.*, where the whole *substratum* of the company has gone, or it becomes impossible to carry on its business; see *Re German Date Coffee Co.* (1881), 20 Ch. D. 169; *Re Brinsmead*, [1897] 1 Ch. 406. Lindley on Companies (ed. 6), Bk. IV., Chap. 1, s. 4.

weeks after such service neglected to pay the debt or to secure or compound for it; or execution by a judgment creditor is returned unsatisfied; or it is proved to the satisfaction of the Court that the company is unable to pay its debts (*d*).

Who may petition.

An application for a winding-up order is to be made by petition, which may be presented by the company itself, or by any one or more creditor or creditors, contributory or contributories, of the company (*e*). For this purpose a shareholder who has paid up in full is a "contributory" (*f*). The right of a contributory to petition cannot be limited or excluded by the articles (*g*); but he cannot petition unless he is an original shareholder or has held his shares for at least six of the eighteen months preceding the commencement of the winding-up, or they have devolved on him through the death of a former holder, or the number of members is reduced below the minimum (*h*). A debenture-holder may present a petition (*i*). The official receiver in bankruptcy may present a petition when a company is being wound up voluntarily or subject to supervision (*k*).

Commencement of winding-up.

The winding-up is deemed to commence at the time of the presentation of the petition, or, if previously there has been a resolution for winding up voluntarily, from the passing of such resolution, and any proceedings in the voluntary winding-up shall be deemed valid unless the Court directs otherwise (*l*). When a winding-up order has been made, no action or other proceeding can be brought or proceeded with against the company without the leave of the Court (*m*); and dispositions of property of the company, or transfers of shares, made between the commencement of the winding-up and the

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(*d*) S. 169.
(*e*) S. 170; Lindley on Companies (ed. 6), Bk. IV., Chap. 1, s. 3.
(*f*) *Re National Savings Bank* (1865), 1 Ch. 547.
(*g*) *Re Peveril Gold Co.*, [1898] 1 Ch. 122.
(*h*) S. 170 (1) (a).
(*i*) *Re Portsmouth Tram. Co.*, [1892] 2 Ch. 362.
(*k*) S. 170 (2).
(*l*) S. 175.
(*m*) S. 177.

winding-up order, are void, unless the Court otherwise orders (*n*).

Liquidators.

For the purpose of conducting the proceedings in winding-up and assisting the Court therein, a liquidator or liquidators may be appointed by the Court (*o*), and until a liquidator is appointed the official receiver (*p*) is provisional liquidator (*q*).

The liquidator has the control and custody of the property of the company (*r*); but it does not vest in him, and, therefore, conveyances of it must be made by the liquidator in the name of the company and under its seal. He has extensive powers which enable him to do everything which may be necessary for winding up the affairs of the company, and realising and distributing its assets, including the power to sell or raise money upon its property, and to bring or defend actions (*s*).

"Contributory."

The term "contributory" means every person liable, or alleged to be liable before the final determination of the list of contributories, to contribute to the assets of the company in the event of its being wound up (*t*); and the persons so liable to contribute are (*u*) all present and past members of the company, subject to the qualifications (*x*) that :—

(1.) A past member is not liable if he has ceased to be a member for one year or upwards prior to the commencement of the winding-up;

(2.) A past member is not liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member;

(3.) A past member is not liable to contribute unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of the Act;

(4.) In the case of a company limited by shares, no contribution is to be required from any member exceeding the amount (if any) unpaid on the shares in respect of which he is liable as a past or present member, or, in the case of a com-

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(*n*) S. 173; *Re Onward Bdg. Soc.*, [1891] 2 Q. B. 463.

(*o*) S. 183.

(*p*) S. 179.

(*q*) S. 185 (1), (4), (5).

(*r*) S. 189.

(*s*) Ss. 191-2, 196.

(*t*) S. 158.

(*u*) S. 157.

(*x*) S. 157.

pany limited by guarantee, exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up;

(5.) Any restriction in a policy of insurance or other contract of the liability of individual members on the policy or contract, or whereby the funds of the company are alone made liable in respect of the policy or contract, remains valid;

(6.) A sum due to any member, in his character of a member, by way of dividends, profits, or otherwise, shall not be deemed a debt from the company as between the member and the creditors, though it may be taken into account in the final adjustment of the rights of the contributories *inter se.*

Members.

A "member" is a person who has agreed to become a member, and whose name is entered on the register of members (*y*). Subscribers of the memorandum of association are deemed to have agreed to become members (*y*). A member whose shares have been forfeited under articles of association providing that forfeiture shall determine his membership, but not his liability for calls due at the time of the forfeiture, is not liable as a contributory but is liable as a debtor (*z*).

Contributories.

Rectification of register.

Entry on the register is a condition precedent to liability as a member (*a*). The list of contributories is settled by the Court, which has power to rectify the register by removing or inserting names (*b*). For instance, the name of a director who is bound to take qualifying shares, but has not done so (*c*), will be inserted, and the name of a person who has been induced to take shares as security upon the representation that they were "fully paid" (*d*), or has taken them under a mistake as to the identity of the company (*e*), will be removed.

The list consists of two parts, first, the list of present members as at the commencement of the winding-up,

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(*y*) S. 25. *Lurgan's Case*, [1902] 1 Ch. 707. See Lindley on Companies (ed. 6), 164.

(*z*) *Ladies Assoc.* v. *Pulbrook*, [1900] 2 Q. B. 376.

(*a*) *Nicol's Case* (1885), 29 Ch. D. 421.

(*b*) S. 203. See s. 100; Lindley on Companies (ed. 6), Bk. IV., Chap. 1, s. 13 (1); *Re Onward Bdg. Soc.*, [1891] 1 Q. B. 463.

(*c*) *Isaacs' Case*, [1892] 2 Ch. 158; *ante*, p. 323.

(*d*) *Bloomenthal* v. *Ford*, [1897] A. C. 156.

(*e*) *Baillie's Case*, [1898] 1 Ch. 110.

which is commonly called the "A list," and, secondly, the list of past members who have ceased to be members within a year before the commencement of the winding-up, which is commonly called the "B list."

If a registered shareholder seeks to escape liability as a contributory in the winding-up on the ground that he was induced to take the shares by fraud or misrepresentation, he must rescind his contract or repudiate the shares within a reasonable time; but it will be too late after proceedings for winding-up have been commenced, unless he has taken some active steps to rescind before the commencement of the winding-up (*f*).

Examination of directors, officers, etc.

After the appointment of a provisional liquidator or the making of a winding-up order the Court may summon before it any officer of the company or person known or suspected to have property of the company in his possession, or supposed to be indebted to it, or any person capable of giving information about the affairs of the company, and examine him concerning the same (*g*); and it may, on the report of the official receiver, order the public examination on oath of any director or officer of the company, or any person taking part in its promotion or formation (*h*). In the course of a winding-up the Court may also, where any promoter, director, manager, liquidator, or officer of the company has misapplied or retained any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, compel him to repay or restore the money or property, or to pay compensation (*i*).

Delinquent directors, etc.

Difference between compulsory and voluntary winding-up

The practical differences between a compulsory winding up by the Court and a voluntary winding up by the shareholders are that, in a winding-up by the Court, the liquidator is appointed by and is an officer of the

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(*f*) See Lindley on Companies (ed. 6), 1068. *Oakes* v. *Turquand* (1867), L. R. 2 H. L. 325; per Lindley, L.J., *Re Scottish Petroleum Co.* (1883), 23 Ch. D. 437.

(*g*) S. 214.

(*h*) S. 216.

(*i*) S. 276. See *ante*, p. 334.

Court, and is obliged to consult and obtain the sanction of the Court or judge before exercising certain of his powers, and this necessarily causes some delay and often considerable expense; whereas, in a voluntary winding-up, the liquidator is appointed by the members and can act on his own discretion without going to the Court, though he may, if he pleases, apply to the Court to determine any question arising in the winding-up, or to exercise powers which the liquidator does not possess (*k*).

When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding can be commenced or proceeded with against the company without the sanction of the Court (*l*); but a voluntary winding-up has not that effect, though the Court may upon application stay any proceedings against the company (*m*).

Voluntary winding-up.

A voluntary winding-up is often resorted to for the purpose of dissolving the company with a view to its reconstruction on a different basis, or to amalgamate with another company (*n*).

A company may be wound up voluntarily under the following circumstances (*o*) :—

> "(1.) When the period, if any, fixed for the duration of the company by the articles expires, or the event, if any, occurs, on the occurrence of which the articles provide that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily:
>
> "(2.) If the company resolves by special resolution (*p*) that the company be wound up voluntarily:
>
> "(3.) If the company resolves by extraordinary resolution (*p*) to the effect that it cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up."

(*k*) See Lindley on Companies (ed. 6), 1186.

(*l*) S. 177.

(*m*) *Currie* v. *Consolidated Kent Collieries Corp.*, [1906] 1 K. B. 134. See s. 252.

(*n*) See s. 234.

(*o*) S. 225.

(*p*) See *ante*, p. 331.

A voluntary winding-up commences as from the date of the resolution to wind up (*q*), but it is not a bar to the right of any creditor or contributory to have the company wound up by the Court if the Court is of opinion that his rights would be prejudiced by a voluntary winding-up (*r*). If the Court orders the company to be wound up by the Court, all proceedings taken in the course of the voluntary winding-up will stand and be deemed to have been validly taken unless the Court, on proof of fraud or mistake, directs otherwise (*s*).

From the commencement of the liquidation the company must cease to carry on its business, except for the purpose of winding it up (*t*). The liquidator, or any contributory or creditor, may apply to the Court to determine any question or to exercise any power which it might exercise in a compulsory winding-up (*u*). Any transfer of shares without the sanction of the liquidator, or alteration in the status of members, made after the commencement of the winding-up, is void (*x*).

Winding-up subject to supervision of Court.

When a resolution has been passed by a company to wind up voluntarily, the Court may make an order that the voluntary winding-up shall continue subject to the supervision of the Court (*y*).

A supervision order being an order to continue a voluntary winding-up, does not alter the period of the commencement of the winding-up, except for the purpose of avoiding a fraudulent preference (*z*); and it may prescribe the extent to which the winding-up is to be carried on without consulting the judge. Practically, winding-up under supervision differs from voluntary winding-up chiefly in the greater facilities which it affords for obtaining the assistance of the Court and the greater control over the liquidator, its general effect being to continue the winding-up subject to such restric-

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(*q*) S. 227.
(*r*) S. 255.
(*s*) S. 175.
(*t*) S. 228.
(*u*) S. 252.
(*x*) S. 229.
(*y*) S. 256.
(*z*) S. 265. See *ante*, p. 343.

tions, if any, as the Court may impose (*a*); and, subject to such restrictions, the liquidator may exercise all his powers without the sanction or intervention of the Court except those of paying any class of creditors in full or making compromises, in which cases the sanction of the Court or of a committee of inspection (where one has been already appointed) is necessary (*b*).

Dissolution of company.

When the affairs of a company have been completely wound up, the Court must make an order that the company be dissolved from the date of the order (*c*). The order must be reported by the liquidator to the registrar of companies, who must enter it in his books (*d*). At any time within two years of the date of the dissolution, the Court may declare the dissolution to have been void upon the application of the liquidator or other person interested (*e*).

In the case of a voluntary winding-up, as soon as the affairs of the company are fully wound up, the liquidator, after presenting his accounts to a general meeting, must make a return to the registrar, who must register it, and then, on the expiration of three months, the company is dissolved, unless the Court has by order deferred the date of dissolution (*f*).

Compromise with creditors or members.

Where a compromise or arrangement is proposed between a company and its creditors or members, or any class of them, the Court may order a meeting of those creditors or members to be called, and, if a majority in number representing three-fourths in value of the creditors or members, present in person or by proxy, agree to the arrangement or compromise, it will, if sanctioned by the Court, be binding on all such creditors or members and on the company, and, if the company is being wound up, on the liquidator and contributories (*g*).

(*a*) Lindley on Companies (ed. 6), Bk. IV., Chap. 2, s. 3. This mode of winding up first appears in 20 & 21 Vict. c. 14, s. 19.

(*b*) S. 260.

(*c*) S. 221.

(*d*) *Ib.* (2).

(*e*) S. 294.

(*f*) S. 236.

(*g*) S. 153.

Unregistered company.

An unregistered company may not be wound up voluntarily or under the supervision of the Court, but only by the Court (*h*).

County Court.

Where the capital of a company paid up or credited as paid up does not exceed £10,000, and the registered office of the company is situate within the jurisdiction of a County Court having jurisdiction under the Act, a petition to wind up the company, or to continue the winding-up under the supervision of the Court, may be presented to that County Court (*i*). In the case of a company whose registered office is within the jurisdiction of the Palatine Courts of Lancaster or Durham and of a company solely engaged in working mines within the Stannaries, whatever may be the amount of its capital or the situation of its registered office, the petition may be presented to the Palatine Court or the Court exercising Stannaries jurisdiction, as the case may be (*k*). Within the limits indicated, these Courts have concurrent jurisdiction with the High Court.

Stannaries.

§ 2. *Debentures and Debenture Stock.*

Meaning of.

The word "debenture," though often used by lawyers, bears no definite legal meaning. It generally signifies a document under the seal of a company given to secure the repayment of money (or money's worth) to a creditor of the company. The debenture may be only a certificate of indebtedness, but it generally contains or imports a covenant to pay, which is usually at the present day accompanied by some charge or security on the property of the company, so that some debentures are secured and some are not secured (*l*).

Although as a general rule debentures are issued in series to different persons whose debentures rank *pari passu*, there is nothing to prevent all the debentures,

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(*h*) S. 338.

(*i*) S. 163.

(*k*) *Ib.*

(*l*) *Levy* v. *Abercorris Co.* (1887), 37 Ch. D. 260; *British India Co.* v. *Inland Revenue Commrs.* (1881), 7 Q. B. D. 165; *Lemon* v. *Austin Friars Investment Trust, Lim.*, [1926] Ch. 1.

or one debenture for the total amount intended to be raised, being issued to one person (*m*).

There is a great difference between corporations established by Royal Charter and companies incorporated by or under the general provisions of an Act of Parliament. A corporation of the former class has power to deal with its property and to bind itself by contract in the same manner as if it was an ordinary person, except in so far as the charter restricts it from so doing. On the other hand, where a corporation is created by statute, the statute must be looked at to see what the corporation is intended to do, and therefore to see what are the limits of its powers (*n*).

Borrowing power of company.

It follows that, where a company is incorporated by a special Act, or under the provisions of a general Act, that Act must be looked at; thus, where it is incorporated under the Companies Acts, its memorandum and articles of association must be looked at for the purpose of seeing whether its power to borrow money on debentures is limited. But, in the absence of restriction, "a company limited by shares may borrow as much money as it can get. A company under the Companies Clauses Acts has only limited powers of borrowing" (*o*).

Debentures irregular but *intra vires*,

Where debentures are improperly issued, there are two possible cases, first, where the issue was within the powers of the company, though it was irregular in the particular circumstances; in which case the debentures are invalid in the hands of a person knowing of the irregularity (*p*) and also in the hands of his assigns, unless they are negotiable, or create a legal charge, or the company is estopped from disputing their validity as against a *bona fide* purchaser for value without notice

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(*m*) *Levy* v. *Abercorris Co.*, *sup.*; *Robson* v. *Smith*, [1895] 2 Ch. 118.

(*n*) *Wenlock* v. *River Dee Co.* (1883), 36 Ch. D. 685, n.; *Ashbury Co.* v. *Riche* (1874), L. R. 7 H. L. 653. And see the note on the limits of corporate powers in Pollock on Contract, Appendix, note D.

(*o*) Per Ld. Macnaghten, *Ooregum Co.* v. *Roper*, [1892] A. C. 147; *General Auction Co.* v. *Smith*, [1891] 3 Ch. 432.

(*p*) *Howard* v. *Patent Ivory Co.* (1888), 38 Ch. D. 156; *Davies* v. *Bolton*, [1894] 3 Ch. 678; *Re Payne & Co.*, [1904] 2 Ch. 608.

—issued *ultra vires.*

of the irregularity. On the other hand, if the debentures are *ultra vires*, which may happen either because all borrowing is prohibited or because there is a limit to the amount which may be borrowed and that amount has already been raised, they are invalid even in the hands of *bona fide* holders for value, except so far as the money which they represent has been applied in paying lawful debts of the company, in which case the debenture holders may be subrogated to the rights of the creditors so paid, but only as creditors by simple contract (*q*). They cannot claim any priority in virtue of the security (*q*).

Re-issue of debentures.

Before the Companies Act, 1907 (*r*), a company which paid off its own debentures could not re-issue them, that is, it could only issue them as new debentures. Now, by the Act of 1929, which re-enacts with amendments sect. 104 of the Act of 1908, where a company has redeemed any debentures previously issued, it may, unless the articles or conditions expressly otherwise provide, keep them alive for the purposes of re-issue, and the person entitled to a debenture which has been re-issued has the same rights and priorities as if it had not previously been issued (*s*).

Charge on uncalled capital.

A company limited by shares can create a charge upon its uncalled capital, unless prohibited by the memorandum or articles of association (*t*), or unless the case is within sects. 49 or 53 of the Act (*u*). A charge upon " future property " is not a charge upon uncalled capital (*x*).

(*q*) Lindley on Companies (ed. 6), Bk. II., Chap. 5, s. 2. *Wenlock* v. *River Dee Co.* (1885), 10 App. Cas. 354; *Landowners' Inclosure Co.* v. *Ashford* (1880), 16 Ch. D. 434.

(*r*) 7 Edw. 7, c. 50, s. 15; repealed by and re-enacted in s. 104 of the Companies Consolidation Act, 1908.

(*s*) S. 75. Particulars of debentures which can be re-issued must be included in every balance sheet of the company, and the re-issue of a debenture is to be treated as the issue of a new debenture for the purposes of stamp duty.

(*t*) *Re Pyle Works* (1890), 44 Ch. D. 534; *Newton* v. *Anglo-Australian Co.*, [1895] A. C. 244.

(*u*) *Re Mayfair Co.*, [1898] 2 Ch. 28. *Ante*, p. 340.

(*x*) *Re Streatham Co.*, [1897] 1 Ch. 15; *Re Russian Spratts Co.*, [1898] 2 Ch. 149.

Power of directors to borrow.

It should also be observed that, even if the company has power to borrow, its liability for the money borrowed in its name by the directors depends upon whether the directors had authority, express or implied, to borrow the money, or in cases where they had no such authority, upon whether the company has ratified the transaction (*y*). In the absence of express provision as to borrowing, the directors of trading companies have, but the directors of other companies have not, an implied power to borrow money for the purposes of the company (*z*).

"Floating charges."

Debentures issued by companies are sometimes secured by a legal mortgage of a specific part of the property of the company, usually effected by means of a trust deed; sometimes they are merely charged on the property of the company for the time being, or on the "undertaking," so as to constitute a floating equitable security, but not so as to prevent the company from dealing with its property in the ordinary course of business (*a*). If any of the property covered by such debentures consists of land, a contract for the sale of such debentures is a contract for the sale of an interest in land within sect. 4 of the Statute of Frauds (now sect. 40 of the Law of Property Act, 1925) (*b*).

> "A floating security is an equitable charge on the assets for the time being of a going concern; it attaches to the subject charged in the varying condition it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes. His right to intervene may of course be suspended by agreement. But if there is no agreement for suspension, he may exercise his right whenever he pleases after default" (*c*).

(*y*) *Irvine* v. *Union Bank of Australia* (1877), 2 App. Cas. 374.

(*z*) *General Auction Co.* v. *Smith*, [1891] 3 Ch. 432, where the cases are discussed.

(*a*) *Willmott* v. *London Celluloid Co.* (1886), 34 Ch. D. 147; *Re Yorkshire Woolcombers' Association*, [1903] 2 Ch. 284; *Evans* v. *Rival Quarries*, [1910] 2 K. B. 979. See Palmer's Company Law (ed. 13), pp. 323—329; Stiebel's Company Law and Precedents (ed. 2), Vol. I., Chap. 7, pp. 532-5.

(*b*) *Driver* v. *Broad*, [1893] 1 Q. B. 744.

(*c*) Per Ld. Macnaghten, *Governments Stock Co.* v. *Manila R. Co.*, [1897] A. C. 86.

Priority of legal mortgages;

It follows that where a company, after issuing debentures which create a "floating charge" only, makes a legal mortgage of a specific part of its property, at any time before the debenture-holders have taken steps to enforce their security such mortgage has priority over the debentures (*d*).

Sometimes the debentures provide that the company shall not create any mortgage or charge to take priority of the debentures; in such case, if they are secured by a mere equitable charge, a person taking a legal mortgage without notice of the debenture charge would take priority over it (*e*).

—of distress, judgment, etc.;

A distress for rent will take priority over such floating charges (*f*); but an execution (*g*) or a garnishee order (*h*) even though made absolute (*i*), will not take priority except so far as the goods have been sold or the money paid before the debenture-holders have done some act, or some event has occurred, which causes their security to become a fixed security (*k*). Certain debts are entitled to priority over claims in respect of such floating charges (*l*).

—of statutory preferential debts.

Realisation of the security.

A debenture which constitutes only a floating security does not specifically affect any particular assets until some event occurs or some act is done by the mortgagee which causes the charge to crystallise into a fixed security (*m*). On the appointment of a receiver (*n*) on behalf of the debenture-holders, or on the commencement of the winding-up of the company, the security of the debenture-holders ceases to be a mere floating

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(*d*) *Wheatley* v. *Silkstone Co.* (1885), 29 Ch. D. 715; *Re Castell & Brown, Lim.*, [1898] 1 Ch. 315.

(*e*) *English & Scottish Co.* v. *Brunton*, [1892] 2 Q. B. 700.

(*f*) *Re Roundwood Co.*, [1897] 1 Ch. 373.

(*g*) *Taunton* v. *Warwickshire, Sheriff of*, [1895] 2 Ch. 319.

(*h*) *Norton* v. *Yates*, [1906] 1 K. B. 112.

(*i*) *Cairney* v. *Back*, [1906] 2 K. B. 746.

(*k*) *Robson* v. *Smith*, [1895] 2 Ch. 118; *Robinson* v. *Burnell's Co.*, [1904] 2 K. B. 624; *Evans* v. *Rival Quarries*, *sup.*

(*l*) Ss. 78, 264. *Ante*, p. 343.

(*m*) *Evans* v. *Rival Quarries*, *sup.*

(*n*) *Re London Pressed Hinge Co.*, [1905] 1 Ch. 576.

charge, and becomes a specific charge on the property of the company then existing (*o*); or it may be expressly made to attach as a specific charge in case of default in payment of interest or of principal (*p*), but the debenture-holders must nevertheless take steps to enforce their security in order to make it attach as a specific charge (*q*). The debenture-holders may lose their priority by negligence (*r*). The occurrence of a winding-up makes the debentures immediately payable, though the specified time of payment has not arrived, so that the debenture-holders can at once enforce their security (*s*).

Floating charges created within three months of winding-up.

Floating charges, however, created within three months of the commencement of a winding-up are, unless it is proved that the company was solvent immediately after the creation of the charge, invalid, except to the amount of any cash paid at the time of or subsequently to the creation of, and in consideration for, the charge, *plus* interest on that amount at the rate of 5 per cent. (*t*).

Remedies of debenture-holders.

Debenture-holders may, if the property charged is in danger, obtain the appointment of a receiver by the Court before any default has been made in payment (*u*). If the debentures, or the trust deed, gives such power, they may themselves appoint a receiver of the property charged (*x*). After default in payment, they may bring an action to enforce their security and obtain payment, and get a receiver appointed in such action (*y*); or they may foreclose (*z*); or they may

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(*o*) *Ex p. Bradshaw* (1879), 15 Ch. D. 465; *English Channel Co.* v. *Rolt* (1880), 17 Ch. D. 715.

(*p*) *Re Horne* (1885), 29 Ch. D. 736.

(*q*) *Governments Stock Co.* v. *Manila R. Co.*, [1897] A. C. 81; see *Evans* v. *Rival Quarries*, *sup.*

(*r*) *Re Castell and Brown*, [1898] 1 Ch. 315.

(*s*) *Hodson* v. *Tea Co.* (1880), 14 Ch. D. 859; *Wallace* v. *Universal Co.*, [1894] 2 Ch. 547.

(*t*) S. 212. *Re Columbian Co.*, [1910] 2 Ch. 120; *Re Orleans Motor Co.*, [1911] 2 Ch. 41.

(*u*) *McMahon* v. *N. Kent Iron Co.*, [1891] 2 Ch. 181; *Re Victoria Co.*, [1897] 1 Ch. 158; *Re London Pressed Hinge Co.*, *sup.*

(*x*) *Re Pound* (1889), 42 Ch. D. 402; *Re Stubbs*, [1891] 1 Ch. 475.

(*y*) *Willmott* v. *Celluloid Co.* (1884), 52 L. T. 642; see *British Linen Co.* v. *S. American Co.*, [1894] 1 Ch. 108.

petition to have the company wound up (*a*); or apply to enforce their security in an existing winding-up (*b*).

There is, however, no power to give effect to the security by a sale, or to appoint a manager of the undertaking, where it is of a public nature, as a railway or gas or waterworks company; in such cases the debenture-holders can only obtain the profits or fruits of the company's business by means of a receiver (*c*).

Companies under Companies Clauses Act, 1845.

Where a company, constituted by a special Act incorporating the Companies Clauses Consolidation Act, 1845 (*d*), is authorised by the special Act to borrow money on mortgage or bond (which are commonly comprehended under the term debenture), it may exercise the power from time to time with the authority of a general meeting to the extent authorised by the special Act (*e*). The mortgages may comprise "the undertaking" (*f*) and future calls on the shareholders (*g*). The mortgagees and bond-holders respectively have no preference one above another by reason of priority of date (*h*).

Mortgage of "undertaking," or calls.

Registration.

A register of the bonds and mortgages is kept, and may be inspected by any shareholder or mortgagee or bond creditor, or by any person interested in a bond or mortgage (*i*).

Transfers.

Transfers of bonds or mortgages must be made by

(*z*) *Sadler* v. *Worley*, [1894] 2 Ch. 170; *Re Continental Co.*, [1897] 1 Ch. 511.

(*a*) *Re Portsmouth Tram. Co.*, [1892] 2 Ch. 362.

(*b*) *Ex p. Bradshaw* (1879), 15 Ch. D. 465.

(*c*) *Blaker* v. *Herts Waterworks Co.* (1889), 41 Ch. D. 399; per James, L.J., in *Attree* v. *Hawe* (1878), 9 Ch. D. 347. See *Central Ontario R.* v. *Trusts Co.*, [1905] A. C. 576.

(*d*) 8 & 9 Vict. c. 16.

(*e*) Ss. 38, 39, 40. Mortgages or bonds issued without the authority of a general meeting are valid in the hands of a purchaser for value without notice: *Re Romford Canal Co.* (1883), 24 Ch. D. 85; *Fountaine* v. *Carmarthen R. Co.* (1868), 5 Eq. 316.

(*f*) As to the meaning of "undertaking," see 8 & 9 Vict. c. 16, s. 2; *Gardner* v. *L. C. & D. R. Co.* (1867), 2 Ch. 201. It appears to mean the going concern created by the special Act.

(*g*) 8 & 9 Vict c. 16, ss. 38, 43. *Ante*, p. 353.

(*h*) Ss. 42, 44. See *Landowners' Co.* v. *Ashford* (1880), 16 Ch. D. 411.

(*i*) S. 45.

deed in the statutory form, which requires registration to complete the title of the transferee (*k*). A transfer "in blank" is not a transfer by deed until the blank has been filled up and the instrument re-delivered by the transferor (*l*); and, therefore, the registration of such a transfer which has not been re-delivered is ineffectual (*l*). The Act requires that the deed shall be stamped and state the true consideration (*m*); it is doubtful whether non-compliance with this provision will render the transfer invalid (*n*).

Interest on the bonds and mortgages is payable in preference to any dividends payable to the shareholders (*o*). If a period is fixed by the mortgage deed or bond for repayment of the principal, upon the expiration of that period the principal becomes payable on demand; if no time is fixed, the mortgagee or bondholder can, after twelve months from the date of the mortgage or bond, demand payment of the principal, and arrears of interest on giving six months' notice, and in the like case the company may at any time pay off the money borrowed on giving six months' notice (*p*).

Remedies of mortgagee,

receiver;

Where the special Act empowers the mortgagees to enforce payment of arrears of interest, or of principal and interest, by the appointment of a receiver, two justices may, upon the mortgagees' application, appoint a receiver of the tolls or sums liable to the payment of the interest, or principal and interest (*q*).

of bond-holder,

execution.

A bond-holder of the company can enforce his security only by action; and on obtaining judgment he is in the same position as any other judgment creditor of the company, *i.e.*, he can obtain a receiver (*r*), and can

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(*k*) Ss. 46, 47.

(*l*) *Powell* v. *London & Provincial Bank*, [1893] 1 Ch. 610; 2 *id.* 555.

(*m*) S. 46.

(*n*) *Powell* v. *London, &c. Bank, sup.*

(*o*) S. 48.

(*p*) Ss. 50, 51.

(*q*) *Ib.* ss. 53, 54.

(*r*) As to execution by the appointment of a receiver, see *post*, p. 374.

issue execution against all its property, but not so as to prevent the carrying on of the undertaking of the company; and, in the case of railway companies, a manager may be appointed, but the rolling stock and plant are protected by statute (*s*). Although the surplus lands of a railway company may be ordered to be sold on the application of an execution creditor, the lands actually used for the purposes of the railway cannot be sold (*t*).

Debenture stock,

—under Companies Clauses Acts;

Where a company, incorporated for the purpose of carrying on any undertaking, is authorised by special Act incorporating Part III. of the Companies Clauses Act, 1863 (*u*), to issue debenture stock, it may with the sanction of a special meeting, raise any part of the money, authorised to be raised by mortgage or bond, by the issue of debenture stock instead of mortgages and bonds. By the Railway Companies Act, 1867, this power is extended to railway companies (*x*), and, by the Companies Clauses Act, 1869 (*y*), to companies which by Act of Parliament have power to borrow on mortgages or bonds, but not power to issue debenture stock.

Debenture stock, with the interest thereon, is a charge on the undertaking of the company prior to all shares or stock of the company, and the interest on it has priority over all dividends or interest on any shares or stock, and ranks next to the interest on mortgages or bonds which have been legally granted before the issue of the debenture stock (*z*); but the holders of debenture stock are not entitled to any priority *inter se* as regards debenture stock issued under the same special Act (*a*).

(*s*) 30 & 31 Vict. c. 127, s. 4, made perpetual by 38 & 39 Vict. c. 31. See *Re Mersey R. Co.* (1888), 37 Ch. D. 610; *Re Eastern and Midlands R. Co.* (1890), 45 Ch. D. 367.

(*t*) *Gardner* v. *L. C. & D. R. Co.* (1867), 2 Ch. 201, 385; *Re Bishop's Waltham R. Co.* (1867), 2 Ch. 382.

(*u*) 26 & 27 Vict. c. 118, ss. 22 *et seq.*

(*x*) 30 & 31 Vict. c. 127, s. 24; *Re Mersey R. Co.*, [1895] 2 Ch. 287.

(*y*) 32 & 33 Vict. c. 48, s. 3.

(*z*) Act of 1863, ss. 23-27.

(*a*) S. 24; *Re Mersey R. Co.*, [1895] 2 Ch. 287.

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Payment of the interest may be enforced by the appointment of a receiver, or by action (*a*). Holders of debenture stock have no right to vote as such at meetings of the company, and cannot require repayment of the principal money paid up in respect of it (*b*).

Debenture stock, therefore, confers a right to a perpetual annuity payable out of the undertaking of the company, and the holder differs from a debenture-holder in that he has no right to the repayment of his capital, though he has a charge for his interest (*c*). He is a creditor and not a member of the company, and receives only a fixed rate of interest whatever the net profits of the company (*d*).

Under Companies Act, 1929.

A company registered under the Companies Act, 1929, may issue debenture stock if empowered by its memorandum of association to do so (*e*); and perhaps under a general borrowing power (*f*). But debenture stock of such companies differs from debenture stock issued under the Companies Clauses Act, 1863, in that the principal as well as the interest is usually charged on the company's property, and the company is bound to repay the principal (*f*).

Issue at discount.

Debentures may be issued at a discount in the absence of provision to the contrary (*g*).

Bills of Sale Acts.

Debentures issued by "any mortgage, loan, or other company and secured upon the capital stock or goods, chattels and effects of such company" are exempted from the operation of the Bills of Sale Act, 1882 (*h*). This exemption is not confined to companies *ejusdem generis* with mortgage and loan companies; and every company authorised to raise money on loan or mortgage

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(*a*) S. 24; *Re Mersey R. Co.*, [1895] 2 Ch. 287.

(*b*) S. 31.

(*c*) *Attree* v. *Hawe* (1878), 9 Ch. D. 337.

(*d*) *Re Bodman*, [1891] 3 Ch. 135, 138.

(*e*) Lindley on Companies (ed. 6), 304.

(*f*) *Ib.* 305.

(*g*) *Re Anglo-Danubian Co.* (1875), 20 Eq. 339; *Webb* v. *Shropshire R. Co.*, [1893] 3 Ch. 307. See Companies Act, 1929, s. 44.

(*h*) *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627.

is a company *ejusdem generis* with a "mortgage or loan" company (*i*).

Debentures, or a deed of charge to cover such debentures, of any incorporated company which is required to keep a register of mortgages, as, for instance, companies subject to the Companies Clauses Consolidation Act, 1845 (*k*), or the Companies Act, 1929, are not bills of sale within the scope of the Bills of Sale Act, 1878 (*l*), for they are not secret documents, or documents of the class by which frauds were perpetrated upon creditors by means of secret bills of sale (*m*).

Register of mortgages.

Limited companies are required to keep a register of mortgages and charges specifically affecting their property (*n*), and to allow any person to inspect it (*o*) and take copies (*p*).

Registration of mortgages and charges.

Every mortgage or charge created (*q*) by a registered company must be registered with the registrar of companies (*r*), if it is—(1) for the purpose of securing any issue of debentures, or (2) on uncalled capital, or (3) created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale, or (4) on any land, wherever situate, or any interest therein, or (5) on any book debts of the company, or (6) a floating charge on the undertaking or property of the company (*s*), or (7) a charge on calls made but not paid, or (8) a charge on a ship or any share in a ship, or (9) a charge on goodwill, on a patent or a licence under a patent, on a trade mark or on a copyright or a licence under a copyright (*t*).

(*i*) 45 & 46 Vict. c. 43; see s. 17. See *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627.

(*k*) 8 & 9 Vict. c. 16.

(*l*) 41 & 42 Vict. c. 31. See *Re Standard Manufacturing Co.*, *sup.*; *Richards* v. *Kidderminster Overseers*, [1896] 2 Ch. 212.

(*m*) *Ante*, pp. 134-5.

(*n*) Companies Act, 1929, s. 88.

(*o*) S. 89.

(*p*) *Nelson* v. *Anglo-American Co.*, [1897] 1 Ch. 130.

(*q*) *Bristol United Breweries* v. *Abbot*, [1908] 1 Ch. 279; *Re Columbian Co.*, [1910] 2 Ch. 120.

(*r*) S. 79 (1).

(*s*) See *Illingworth* v. *Houldsworth*, [1904] A. C. 355.

(*t*) S. 79 (2).

Unless registered within twenty-one days after its creation it is void against the liquidator or creditors of the company so far as any security upon its property or undertaking is thereby conferred, but without prejudice to any obligation to repay the money thereby secured (*u*). The time for registration may be extended, and mistakes or omissions may be rectified by order of a judge (*x*).

Perpetual debentures.

Debentures may be made irredeemable, or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long (*y*).

Enforcement of contract to subscribe for debentures.

A contract with a company to take up and pay for any of its debentures may now be enforced by an order for specific performance (*z*).

Local Loans Act, 1875.

The Local Loans Act, 1875 (*a*), contains provisions as to the raising of loans by local authorities on the security of debentures, debenture stock, or annuity certificates. The Act does not confer any fresh powers of borrowing, but presupposes that the local authority has *aliunde* power to borrow in one or all of these forms.

(*u*) S. 79 (1).

(*x*) S. 85. *Re Johnson & Co.*, [1902] 2 Ch. 101; *Re Cardiff Workmen's Cottage Co.*, [1906] 2 Ch. 627; *Re Ehrmann*, *id.* 697.

(*y*) S. 74. See *Southern Brazilian R. Co.*, [1905] 2 Ch. 78.

(*z*) S. 76. See *South African Territories* v. *Wallington*, [1898] A. C. 309; *ante*, p. 171.

(*a*) 38 & 39 Vict. c. 83.

CHAPTER XVI.

EXECUTIONS.

§ 1. *General.*

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We proceed to discuss the methods of enforcing a judgment debt against the personal estate of the debtor by execution (*a*).

Judgment creditor not a purchaser.

It is a general principle, with regard to both real and personal property, that a judgment creditor is not a purchaser, that he stands in the shoes of the judgment debtor, and can obtain by execution only such property as belongs to the debtor both at law and in equity (*b*); he must take subject to all prior interests created by the debtor for value, whether legal or equitable (*c*).

Execution with leave

Generally execution can be levied without leave, but in certain cases leave must be obtained, the most important instances being where six years have elapsed since the judgment or order, or any change has taken place, by death (*d*) or otherwise, in the parties entitled or liable to execution, or a husband is entitled or liable to execution on a judgment for or against a wife, or upon a judgment against an executor or administrator in respect of assets coming to his hands *in futuro* (*quando acciderint*), or a party is entitled to execution against any of the shareholders of a company on a

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(*a*) "Execution signifieth in law the obtaining of an actual possession of anything acquired by judgment of law, or by a fine executory levied, whether it be by the sheriff or by entry of the party"; Co. Litt. 154a. "An action is said in its proper sense to continue until judgment be given, and after judgment doth process of execution begin"; Co. Litt. 289a. See as to executions generally, R. S. C., Ord. XLII.; Anderson on Executions.

(*b*) *Jennings* v. *Mather*, [1902] 1 K. B. 1.

(*c*) See *Whitworth* v. *Gaugain* (1846), 1 Ph. 728, Cr. & Ph. 325, and other cases, explained in Elph. & Cl. Searches, 10.

(*d*) See *Stewart* v. *Rhodes*, [1900] 1 Ch. 386; *Re Clements*, [1901] 1 K. B. 260.

judgment against such company or a public officer or other person representing the company (*e*).

When a company is being wound up execution against the company cannot be issued or proceeded with without leave (*f*). In the case of the bankruptcy of a judgment debtor, the rights of a judgment creditor to issue execution, or to retain the proceeds of an execution already levied, are affected by the Bankruptcy Act, 1914 (*g*).

Execution may be effected by means of a writ or order addressed to the sheriff or other public officer, or by the Court making an order supplemental to the judgment, or giving special directions to some private person for the purpose of enforcing the judgment.

§ 2. *Fieri Facias.*

What can be seized under a *fi. fa.*

A writ (*h*) of *fieri facias* (commonly called *fi. fa.*) is a writ given to a judgment (*i*) creditor by the common law. It is a writ addressed by the Crown to the sheriff (*k*), by virtue of which he seizes the goods and chattels of the debtor and sells them, and (in practice) applies the proceeds in payment to the judgment creditor of the amount due to him instead of paying it into Court as directed by the writ. At common law the sheriff could seize under a *fi. fa.* all the debtor's corporeal personal property (*l*) which can be sold, except wearing apparel actually in use and (perhaps) goods in the personal possession of the debtor (*m*). But it is

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(*e*) See *ante*, pp. 317, 324, and R. S. C., Ord. XLII., r. 23.

(*f*) Companies Act, 1929, ss. 172, 174, 258.

(*g*) 4 & 5 Geo. 5, c. 59. See *Burns-Burns' Trustee* v. *Brown*, [1895] 1 Q. B. 324; *Johnson* v. *Pickering*, [1908] 1 K. B. 1. *Post*, p. 406.

(*h*) See the forms of *fi. fa.* in R. S. C., Appx. H.

(*i*) An order, as well as a judgment, for payment of money can be enforced by a *fi. fa.*, R. S. C., Ord. XLII. rr. 17, 24.

(*k*) In the County Court a warrant of execution in the nature of a *fi. fa.* is addressed to the high bailiff of the Court, and in any other inferior Court a warrant of the like nature is issued to one of the bailiffs of the Court.

(*l*) Including leaseholds for years.

(*m*) *Sunbolf* v. *Alford* (1838), 3 M. & W. 254.

provided by statute (*n*) that "the wearing apparel and bedding of any judgment debtor or his family and the tools and implements of his trade," not exceeding in the whole the value of £5, shall not be liable to seizure.

The common law rule as to things liable to seizure has been extended by the Judgments Act, 1838 (*o*) to money (*p*), bank notes, cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money, and the sheriff can pay the money or bank notes to the execution creditor, and hold the other property so authorised to be seized as security for the amount directed to be levied by the *fi. fa.*, with power to sue thereon at the time of payment. Since that Act the writ has been available against the chattels to which the debtor is entitled in equity (*q*).

It may also be issued to enforce judgments of Courts of Equity which involve payment of money (*r*).

Fixtures.

Fixtures annexed to the freehold of the debtor cannot be seized; but, where the debtor is possessed of the land for a term of years, fixtures which may be removed by him can be seized (*s*). Emblements, *i.e.*, those growing crops which pass to the executor as being the fruit of the industry of the owner, can be taken in execution (*t*), but not permanent growths, such as trees or grass. Goods pledged can be seized for the debt of the pledgor on payment of the debt to the pledgee, but not otherwise (*u*); and the interest of the pledgee can be taken in execution under a *fi. fa.* for the debt of the pledgee (*x*). Things let to the debtor may be

Emblements —crops.

Things pledged to or hired by debtor.

(*n*) Payment of Small Debts Act, 1845 (8 & 9 Vict. c. 127), s. 8. See *Re Dawson*, [1899] 2 Q. B. 54.

(*o*) 1 & 2 Vict. c. 110, s. 12.

(*p*) *I.e.*, coin, not debts due to the judgment debtor; *Harrison* v. *Paynter* (1841), 6 M. & W. 387.

(*q*) 1 & 2 Vict. c. 110, s. 18. See *Stevens* v. *Hince* (1914), 110 L. T. 935.

(*r*) R. S. C., Ord. 42, r. 3.

(*s*) *Poole's Case* (1704), 1 Salk. 368; *Dumergue* v. *Rumsey* (1863), 2 H. & C. 777. See notes to *Elwes* v. *Maw* (1802), 2 Sm. L. C. (ed. 13) 208 *et seq.*

(*t*) See 56 Geo. 3, c. 50, s. 1.

(*u*) *Rogers* v. *Kennay* (1846), 9 Q. B. 592.

(*x*) *Re Rollason* (1887), 34 Ch. D. 495.

seized, but only his interest therein can be sold, and, if the sheriff sells more, he may become liable to an action for the conversion (*y*).

But the Bankruptcy and Deeds of Arrangement Act, 1913 (*z*), provides that, subject to the provisions as to executions in case of bankruptcy (*a*), where any goods in the possession of a judgment debtor are sold under an execution without any adverse claim being made thereto, the purchaser shall obtain a good title, and no action can be maintained against the sheriff or other officer for any sale of such goods, or for paying over the proceeds thereof, before the receipt of a claim by a person interested, unless it is proved that the person against whom the claim is made had notice, or might by reasonable inquiry have ascertained, that the goods were not the property of the judgment debtor. This, however, does not affect the right of any claimant who proves that at the time of the sale he had a title to any goods so seized and sold to seek any remedy he may be entitled to against persons other than the sheriff or other officer concerned, *e.g.*, the judgment creditor (*b*).

Railway companies.

The rolling stock and plant of a railway company are in some cases protected from execution (*c*). The pay, arms, ammunition, equipments, regimental necessaries or clothing of all soldiers of the regular forces cannot be seized in execution (*d*).

Soldiers.

Possession of sheriff.

By the effect of the seizure the sheriff acquires possession of the goods, and therefore may maintain an action against any person who takes them (*e*); but the debtor remains the owner of them till the sheriff sells (*f*).

(*y*) Consider *Fenn* v. *Bittleston* (1851), 7 Ex. 152.

(*z*) 3 & 4 Geo. 5, c. 34, s. 15.

(*a*) *Post*, p. 407.

(*b*) See *Jones Bros.* v. *Woodhouse*, [1923] 2 K. B. 117.

(*c*) 30 & 31 Vict. c. 127, s. 4; 38 & 39 Vict. c. 31, s. 1; 46 & 47 Vict. c. 39.

(*d*) Army Act, 1881, s. 144. *Post*, p. 371.

(*e*) *Wilbraham* v. *Snow* (1669), 2 Wms. Saund. 47.

(*f*) *Giles* v. *Grover* (1832), 9 Bing. 128; 1 Cl. & F. 72; 36 R. R. 27; *Woodland* v. *Fuller*, 11 A. & E. 859.

Execution subject to rent.

Where the goods seized are on "any messuages, lands or tenements leased (*g*) for life or lives, term of years, or otherwise," they cannot be taken unless the execution creditor, before the removal of the goods from the premises, pays the landlord all sums due for rent, not exceeding, in the case of tenements let at a weekly rent, four weeks' arrears, in the case of tenements let for any other term less than a year, the arrears of rent accruing during four such terms, and in any case not exceeding one year's rent (*h*). The sheriff levies for the amount so paid for rent for the benefit of the execution creditor (*h*).

Sale by sheriff.

After the seizure the sheriff's officer employs an auctioneer to catalogue and sell the goods. The sale is on the premises where the goods are seized if the person in possession of the premises consents; if he does not, they are removed for the purposes of the sale. The sheriff's officer may remain on the premises a reasonable time for the purpose of removing the goods to a place of safe custody till they can be sold. Where the execution is for upwards of £20, including incidental legal expenses, the sale must be by public auction and not by a bill of sale or private contract, unless the Court from which the proceedings issued orders otherwise (*i*).

Goods seized, when bound as against purchaser from debtor.

At common law the goods are bound from the *teste* (*k*) of the writ of execution (*l*), so that no subsequent dealing with them by the debtor could take away the sheriff's right to seize them if he could find them within his bailiwick. By the Statute of Frauds (*m*) it was

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(*g*) *I.e.*, under an existing lease, not under a lease which has determined before the seizure; *Cox* v. *Leigh* (1874), L. R. 9 Q. B. 333.

(*h*) 8 Anne, c. 14 (c. 18 in Revised Statutes), s. 1, as amended by 7 & 8 Vict. c. 96, s. 67; County Courts Act, 1888, s. 160. See *Re Mackenzie*, [1899] 2 Q. B. 566.

(*i*) Bankruptcy Act, 1883, s. 145; Bankruptcy Act, 1890, s. 12; R. S. C., Ord. XLIII. rr. 8-14; *Crawshaw* v. *Harrison*, [1894] 1 Q. B. 79.

(*k*) *I.e.*, the date, because, when the King's writs were in Latin, the date was contained in the clause beginning "*Teste meipso.*"

(*l*) *Anon.*, Cro. Eliz. 174; *Fleetwood's Case* (1611), 8 Rep. 171a.

(*m*) 29 Car. 2, c. 3, s. 16.

provided that the goods were not to be bound, as regards purchasers for value (*n*), until the writ was delivered to the sheriff (*o*); and, by the Mercantile Law Amendment Act, 1856 (*p*), that no writ of *fi. fa.* should prejudice the title to goods acquired before the actual seizure of the goods by a *bona fide* purchaser for value without notice that the writ had been delivered to the sheriff.

Sale of Goods Act, 1893.

These provisions were repealed by the Sale of Goods Act, 1893 (*q*), which provides that "a writ of *fi. fa.*, or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff (*r*) to be executed," and that the date of such delivery shall be indorsed on the writ (*s*). But "no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration" without notice "that such writ, or any other writ by virtue of which the goods of the execution debtor might be seized or attached, had been delivered to and remained unexecuted in the hands of the sheriff" (*s*).

Bailiff.

In practice the writ is generally executed by a "bound bailiff" (*t*) under an order from the sheriff, called "a warrant," to execute the writ. But it may be executed by the sheriff in person or by the under-sheriff, or by a special bailiff under the sheriff's warrant (*u*).

When a *fi. fa.* is once sued out, it may be executed notwithstanding the death of the execution creditor, or of the debtor, except in respect of property made seizable by the Judgments Act, 1838 (*x*).

(*n*) *Hutchinson* v. *Johnston* (1786), 1 T. R. 729; 1 R. R. 380.

(*o*) *Guest* v. *Cowbridge R. Co.* (1868), 6 Eq. 619; *Ex p. Williams* (1872), 7 Ch. 317, per Mellish, L.J.

(*p*) 19 & 20 Vict. c. 97, s. 1.

(*q*) 56 & 57 Vict. c. 71.

(*r*) "Sheriff" includes any officer charged with the enforcement of a writ of execution: s. 26 (2).

(*s*) S. 26 (1).

(*t*) *I.e.*, a person who has entered into a bond with sureties for the due performance of his office. See Blackstone, Bk. i., ch. 9.

(*u*) See as to the under-sheriff and other officers, Sheriffs Act, 1887 (50 & 51 Vict. c. 55).

(*x*) *Johnson* v. *Pickering*, [1908] 1 K. B. 1. *Ante*, p. 364.

Return *to* the writ—and *of* the writ.

Strictly speaking, it is the duty of the sheriff to draw up and sign a formal statement of what he has done in obedience to the writ; which statement when signed is called "the return to the writ"; and he ought afterwards to send the writ and the return to the writ to the Supreme Court. This latter process is sometimes called "the return of the writ." The judgment creditor or judgment debtor can compel the sheriff to return the writ (*y*).

The return *to* the writ must be carefully distinguished from the return *of* the writ; the difference between them is analogous to the difference between writing and posting a letter.

Execution against partnership property.

Under a *fi. fa.* against a partner on a judgment against such partner for a private debt the sheriff could formerly seize all such of the assets of the firm as are seizable under a *fi. fa.*, but he could only sell the share and interest of the execution debtor in the goods so seized, and not the whole of the debtor's interest in the partnership, including book debts and goodwill, for these could not be reached by a *fi. fa*; and the only way in which the purchaser could ascertain what he was entitled to under the sale was by taking the accounts of the partnership; for, as we have pointed out, the share of each partner is not a share in any specific asset (*z*). By the Partnership Act, 1890 (*a*), a writ of execution is not to issue against any partnership property except on a judgment against the firm (*b*), but the judgment creditor of a partner may obtain an order charging the partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and the appoint-

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(*y*) R. S. C., Ord. LII., r. 11.

(*z*) *Ante*, p. 12. See *Helmore* v. *Smith* (1) (1886), 35 Ch. D. 436; Anderson on Execution, 208, 284.

(*a*) 53 & 54 Vict. c. 39, s. 23. This applies to "limited" partnerships: 7 Edw. 7, c. 24, s. 7.

(*b*) As to execution where a judgment or order is against a firm, see R. S. C., Ord. XLVIIIa., r. 8; *Davis* v. *Hyman*, [1903] 1 K. B. 854.

ment of a receiver of that partner's share of profits and of any other money which may be coming to him in respect of the partnership (*c*); and the other partner or partners may redeem the interest charged, or, in case of a sale being directed, may purchase it.

§ 3. *Elegit.*

Elegit.

Under the writ of elegit, which is founded upon the statute 13 Edw. 1, c. 18 (Westminster II.), the sheriff seized and delivered to the judgment creditor all the chattels of the debtor (saving only his oxen and beasts of the plough), and one half of his land, until the debt was levied. Subsequently it was enacted that the whole of the debtor's land could be seized under the writ (*d*). Now a writ of elegit does not extend to goods (*e*).

A creditor to whom the debtor's land has been delivered under an "elegit" can, by application to the Court, obtain an order for the sale of the debtor's interest (*f*).

Execution by means of the Court.

We proceed to consider various modes of execution by means of orders of the Court itself as distinguished from execution under the authority of writs.

§ 4. *Attachment of debts.*

Attachment of debts.

Garnishee.

A judgment creditor (*g*) may obtain from the Court or a judge *ex parte* an order that all debts owing or accruing from any person, called the garnishee, to the judgment debtor, shall be attached to answer the judgment, and directing by the same or a subsequent order the garnishee to show cause why he should not pay to the judgment creditor the debt due from him or so much as will satisfy the judgment debt (*h*). Service of an

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(*c*) *Post*, pp. 372-3. *Brown* v. *Hutchinson*, [1895] 2 Q. B. 126.

(*d*) 1 & 2 Vict. c. 110, s. 11.

(*e*) 46 & 47 Vict. c. 52, s. 146 (1).

(*f*) 27 & 28 Vict. c. 112, s. 4; Order LV., r. 9B.

(*g*) In this place the phrase includes any person who has obtained a judgment or order for payment of money.

(*h*) R. S. C., Ord. XLV., r. 1.

order on, or notice of it to, the garnishee binds such debts in his hands (*i*). The debts which can be attached may be legal or equitable (*k*), payable at the present or at a future time (*l*); but they must be existing debts. Unliquidated damages (*m*), or an unascertained sum (*n*), or a debt to arise on a condition (*o*), or money which will be payable to the debtor by trustees when they have received it, but not yet received by them (*p*), or rent not yet due (*q*), or income of funds payable to a married woman subject to a restraint on anticipation at the time the transaction giving rise to the judgment debt took place (*r*), cannot be attached; though rent which is due can be attached (*s*). Debts that cannot be assigned cannot be attached. The pay (*t*) or pension (*u*) of an officer in the army or navy (*t*), seamen's wages (*x*), and the wages of a servant, labourer, or workman, at any rate in an inferior Court, cannot be attached (*y*). The making of a garnishee order is discretionary, and the Court will refuse an order when it would be inequitable to make one (*z*).

If the garnishee does not pay into Court the sum that he ought to pay, and does not dispute the debt claimed to be due from him to the judgment debtor, the Court may direct execution to issue against him; but if he disputes his liability, the Court may direct the

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(*i*) *Ib.* r. 2; *Rogers* v. *Whiteley*, [1892] A. C. 118; *Galbraith* v. *Grimshaw*, [1910] A. C. 508.

(*k*) Per Brett, M.R., *Webb* v. *Stenton* (1883), 11 Q. B. D. 525.

(*l*) *Tapp* v. *Jones* (1875), L. R. 10 Q. B. 591; *Edmunds* v. *Edmunds*, [1904] P. 362.

(*m*) *Jones* v. *Thompson* (1858), E. B. & E. 63.

(*n*) *Richardson* v. *Elmit* (1876), 2 C. P. D. 9.

(*o*) *Howell* v. *Metropolitan District R. Co.* (1881), 19 Ch. D. 508.

(*p*) *Webb* v. *Stenton* (1883), 11 Q. B. D. 518.

(*q*) *Barnett* v. *Eastman* (1898), 67 L. J. Q. B. 517.

(*r*) *Barnett* v. *Howard*, [1900] 2 Q. B. 784; *Wood* v. *Lewis*, [1914] 3 K. B. 73.

(*s*) *Mitchell* v. *Lee* (1866), L. R. 2 Q. B. 259.

(*t*) *Apthorpe* v. *Apthorpe* (1887), 12 P. D. 192.

(*u*) *Jones* v. *Coventry*, [1909] 2 K. B. 1029. *Ante*, p. 170.

(*x*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 163.

(*y*) 33 & 34 Vict. c. 30; *Gordon* v. *Jennings* (1882), 9 Q. B. D. 45.

(*z*) *Martin* v. *Nadel*, [1906] 2 K. B. 26.

question to be tried (*a*). If it is suggested that a third person has a lien or charge on the debt, the Court can order such person to appear, and may bar his claim or make such order as it thinks fit with respect to the lien or charge (*b*). Payment by the garnishee into Court, or to the judgment creditor on an order absolute being made (*c*), or execution for such payment (*d*) levied upon him in the proceedings, is a valid discharge as against the judgment debtor to the amount paid or levied (*e*). It should be observed that the effect of a garnishee order is to place the judgment creditor in the shoes of the judgment debtor (*f*). He has, therefore, no better right than the latter, so that, if the judgment debtor has created an equitable charge on the debt attached, the judgment creditor takes the debt subject to the charge, even if the person entitled to the charge has not perfected his title by giving notice (*ante*, p. 160) to the garnishee (*g*); and debts which have been assigned by the judgment debtor before the order cannot be attached; nor the balance of a debt already attached under a garnishee order if it has been assigned (*h*), for a garnishee order binds only what the judgment debtor can honestly deal with without interfering with the interests of third persons (*i*). A debt attachment book, in which particulars of the attachment have to be entered, is kept in the Central Office (*k*).

§ 5. *Charging Order.*

Charging order.

Stock or shares could not formerly be taken in execution; but now a judgment creditor can obtain (*l*) an

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(*a*) Ord. XLV. rr. 3, 4.

(*b*) Ord. XLV. rr. 5, 6.

(*c*) *Re Webster*, [1907] 1 K. B. 623.

(*d*) *Turner* v. *Jones* (1856), 1 H. & N. 878.

(*e*) Ord. XLV. r. 7.

(*f*) See *Evans* v. *Rival Granite Quarries*, [1910] 2 K. B. 979.

(*g*) *Badeley* v. *Consolidated Bank* (1888), 34 Ch. D. 536, 546; 38 *id*. 238, 257.

(*h*) *Yates* v. *Terry*, [1902] 1 K. B. 527.

(*i*) *Davis* v. *Freethy* (1890), 24 Q. B. D. 519.

(*k*) Ord. XLV. r. 8.

(*l*) 1 & 2 Vict. c. 110, ss. 14, 15; 3 & 4 Vict. c. 82, s. 1; R. S. C., Ord. XLVI. r. 1; see *Stewart* v. *Rhodes*, [1900] 1 Ch. 386.

order, called a "charging order," charging the judgment debt and interest upon the debtor's interest (*m*), whether in possession, remainder, or reversion, and whether vested or contingent, in any government stock, funds or annuities, or any stock or shares (*n*) in a public company in England, or the dividends or interest thereof, whether being funds in Court or not, and whether standing in the debtor's name in his own right (*o*), or in the name of a trustee for him (*p*); and a charging order may be made upon cash in Court to the credit of the debtor (*q*). The order entitles the creditor to the same remedies as if the charge was made by the debtor. The effect of the order does not depend on the capacity of the debtor to make the charge, but on the validity of the judgment (*r*). No proceedings can be taken to enforce payment of the debt by realising the security until after six months from the date of the order, though the creditor can, in the meantime, obtain an order restraining the debtor from receiving the dividends accruing during the six months (*s*). In order to prevent the debtor from disposing of his interest, the charging order may be made in the first instance *ex parte* as an order *nisi*, and, when made absolute, the charge takes effect from the date of the charging order *nisi* (*t*). If the fund is in Court, notice of the order *nisi* must be given to the Paymaster-General (*u*). The charge conferred by the order affects only the interest that the debtor can, or could if *sui juris*, honestly assign; and, therefore, it confers no priority over incumbrances

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(*m*) *Bolland* v. *Young*, [1904] 2 K. B. 824; *Ideal Co.* v. *Holland*, [1907] 2 Ch. 157.

(*n*) Not debentures: *Sellar* v. *Bright & Co.*, [1904] 2 K. B. 446.

(*o*) *I.e.*, to which he is beneficially entitled; *Cooper* v. *Griffin*, [1892] 1 Q. B. 740; *Howard* v. *Sadler*, [1893] 1 Q. B. 1.

(*p*) *South Western Co.* v. *Robertson* (1881), 8 Q. B. D. 17.

(*q*) *Brereton* v. *Edwards* (1888), 21 Q. B. D. 488.

(*r*) *Re Leavesley*, [1891] 2 Ch. 1, where a charging order was made on a fund in Court belonging to a lunatic in respect of debts incurred before the lunacy; and *Re Brown*, [1900] 1 Ch. 489.

(*s*) *Watts* v. *Jefferyes* (1851), 3 Mac. & G. 372.

(*t*) *Haly* v. *Barry* (1868), 3 Ch. 452.

(*u*) *Brereton* v. *Edwards* (1888), 21 Q. B. D. 488.

created before the order *nisi*, even if the incumbrancer has neglected (where the debtor's interest is equitable) to perfect his title by notice to trustees (*x*), or, if the fund is in Court, by obtaining a stop order (*y*). A judgment creditor who has obtained a charging order must, if he wishes to enforce the charge conferred by the charging order, institute an action for that purpose, for the Court cannot, by an order in the action in which judgment was recovered, direct a sale of the property charged (*z*).

§ 6. *Equitable Execution—Receiver.*

"Equitable execution."

Where there is no remedy by ordinary process of execution, an order for a receiver may be obtained so as to give the judgment creditor the same benefit which he would have got by execution. This is equitable relief and is not governed by the same rules as legal execution in the strict sense of the term (*a*). It is, however, "execution" within the meaning of the Judgment Extensions Act, 1868 (*b*); and a receiver may be appointed in the case of a certificate of a Scotch judgment registered in the High Court (*c*).

A receiver was appointed by the Court of Chancery in aid of a judgment at law when the plaintiff showed that he had sued out the proper writ of execution, and was met by certain difficulties arising from the nature of the property, which prevented his obtaining possession at law (*d*). Since the Judicature Acts the Court which gave judgment can make the order, and it is not

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(*x*) *Scott* v. *Hastings* (1858), 4 K. & J. 633; see per Kay, L.J., *Re Leavesley*, [1891] 2 Ch. 10, 11.

(*y*) *Carter* v. *Stadden* (1886), 34 W. R. 363.

(*z*) *Leggott* v. *Western*, 12 Q. B. D. 287; *Kolchmann* v. *Meurice*, [1903] 1 K. B. 534.

(*a*) *Thompson* v. *Gill*, [1903] 1 K. B. 760, 769; *Re Shephard* (1889), 43 Ch. D. 131; and see *Levasseur* v. *Mason*, [1891] 2 Q. B. 71; *De Galve* v. *Gardner*, [1903] 2 Ch. 727.

(*b*) 31 & 32 Vict. c. 54, s. 4.

(*c*) *Thompson* v. *Gill*, *sup.*

(*d*) *Thompson* v. *Gill*, [1903] 1 K. B. 760, 769; *Re Shephard* (1889), 43 Ch. D. 131; and see *Levasseur* v. *Mason*, [1891] 2 Q. B. 71; *De Galve* v. *Gardner*, [1903] 2 Ch. 727.

necessary to go through the formality of first issuing a writ of execution (*e*).

Receiver.

A receiver is a person appointed by the Court to receive the rents and profits or income of specified property, whether real, chattel real, or personal, or of any legal or equitable interest therein.

Judicature Act, 1925, s. 45 (1).

By the Supreme Court of Judicature Act, 1925 (*f*), the Court may appoint a receiver "in all cases in which it appears to the Court to be just or convenient" that such appointment should be made. This gives jurisdiction to appoint a receiver by way of equitable execution only when the circumstances of the case are such as would have enabled the Court of Chancery to make such an order before the Act of 1873, and does not give jurisdiction to appoint a receiver merely because it will be a more convenient mode of satisfying the judgment than the ordinary modes of execution (*g*). A County Court has this jurisdiction (*h*).

When obtainable.

Equitable execution, therefore, can only be obtained where a debtor's property cannot be got at by the ordinary modes of execution. For instance, where the debtor's real property is subject to a mortgage (*i*); where specific chattels are subject to a mortgage bill of sale; or where it is wished to take in execution the interest of the debtor under a settlement of personalty (*k*), in which case the appointment of the receiver does not dispossess the trustees, but only renders it their duty to hand over to the receiver the property or income which they would be bound to hand over to the debtor if the receiver had not been appointed.

A receiver will not be appointed of property which is

(*e*) *Anglo-Italian Bank* v. *Davies* (1878), 9 Ch. D. 275; see Elph. & Cl. Searches, 72.

(*f*) 15 & 16 Geo. 5, c. 49, s. 45 (1), replacing s. 25 (8) of Judicature Act, 1873 (repealed from January 1, 1926).

(*g*) *Harris* v. *Beauchamp*, [1894] 1 Q. B. 801; *Morgan* v. *Hart*, [1914] 2 K. B. 183.

(*h*) *R.* v. *Selfe*, [1908] 2 K. B. 121.

(*i*) *Anglo-Italian Bank* v. *Davies* (1878), 9 Ch. D. 283.

(*k*) *Webb* v. *Stenton* (1883), 11 Q. B. D. 518.

inalienable by the debtor, such as inalienable pensions (*l*), or alimony under the order of a Court (*m*), or of future earnings (*n*), or of a patent (*o*).

Prior incumbrances.

It need hardly be said that the appointment of a receiver does not interfere with the rights of a prior incumbrancer, except that if the latter is not in possession he is not allowed to take possession without the leave of the Court after the receiver has gone into possession.

Form of order, and how obtained.

The order appointing the receiver must clearly define the property of which he is to take possession, for it is not the practice of the Court to appoint a receiver of a judgment debtor's property generally (*p*).

An application for the appointment of a receiver by way of equitable execution must, generally, be made by summons; but there is jurisdiction to appoint upon an *ex parte* application, or to grant an interim injunction (*q*), which will be exercised where there is danger that the property will disappear before a summons can be heard (*r*).

The order appointing the receiver generally directs him to give security (*s*); he has to pay all moneys received by him into Court, and from time to time the moneys, after providing for costs and the receiver's remuneration, are paid out to the persons entitled thereto.

The receiver by his appointment becomes an officer of the Court, and if he takes possession no one is entitled to interfere with him without an order of the Court.

(*l*) *Lucas* v. *Harris* (1886), 18 Q. B. D. 127; *Crowe* v. *Price* (1888), 22 Q. B. D. 429.

(*m*) *Paquine* v. *Snary*, [1909] 1 K. B. 688.

(*n*) *Holmes* v. *Millage*, [1893] 1 Q. B. 551; *Cadogan* v. *Lyric Theatre*, [1894] 3 Ch. 338.

(*o*) *Edwards* v. *Picard*, [1909] 2 K. B. 903.

(*p*) *Hamilton* v. *Brogden* (1891), W. N. 14.

(*q*) R. S. C., App. K., Form 61a.

(*r*) *Lloyds Bank* v. *Medway Co.*, [1905] 2 K. B. 359; *The Birnam Wood*, [1907] P. 1, 12.

(*s*) See *Edwards* v. *Edwards* (1876), 2 Ch. D. 291.

§ 7. *Sequestration* (*t*).

Sequestration is a process *in rem*, not *in personam* (*u*), for the purpose of compelling obedience not only to an order or judgment for payment of money, but to any other order. Under the present Rules of the Supreme Court, where any person is by any judgment or order directed to pay money into Court or to do any other act *in a limited time*, and after due service of such judgment or order refuses or neglects to obey the same, the person prosecuting the judgment or order can, without obtaining any order for that purpose, issue a writ of sequestration against the estate and effects of such disobedient person (*x*). Sequestration was, and is, a process of contempt to compel a defendant to perform a duty (*y*).

The writ of sequestration is a writ issued from the High Court, and is addressed to not less than four persons therein named called the sequestrators, and nominated by the person prosecuting the judgment commanding them, or any three or two of them, to enter upon and to take the rents and profits of the real estate and the goods and personal estate of the person in default, and to keep the same under sequestration in their hands until the person in default shall pay a certain sum of money, or clear his contempt, and the Court shall make other order to the contrary (*z*).

The sequestrators are entitled to all the debts due to, and choses in action of, the person in default (*a*), and to his stock (*b*), and to money in Court belonging to

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(*t*) For the history of the writ of sequestration, see Anderson on Executions, 512 *et seq.*

(*u*) *Tatham* v. *Parker* (1853), 1 Sm. & G. 514.

(*x*) Ord. XLIII. r. 6.

(*y*) Per Chitty, J., *Pratt* v. *Inman* (1889), 43 Ch. D. 175; *Re Pollard*, [1903] 2 K. B. 41, 47, *per* Romer, L.J.

(*z*) See the form in App. H. (No. 13) to R. S. C.

(*a*) *Francklyn* v. *Colhoun* (1819), 3 Swanst. 276; *Miller* v. *Huddlestone* (1882), 22 Ch. D. 233.

(*b*) *Cowper* v. *Taylor* (1848), 16 Sim. 314.

him (*c*); but until an order is obtained from the Court for payment of the debt or other chose in action to the sequestrators, the debtor may pay the person in default (*d*). The Court can order the sale of stock standing in the name of the person in default (*dd*).

The sequestrators may take possession of all personal chattels of the person in default, including growing crops (*e*), but excepting wearing apparel and bedding of that person and his family, or the tools and implements of his trade, the value of such apparel, bedding, tools and implements, not exceeding in the whole £5 (*f*). The sequestrators cannot, however, sell the chattels without leave of the Court, which is only granted if the object of the sequestration is to enforce payment of a sum of money, or if costs have been incurred, or if the goods are of a perishable nature.

When the person in default has cleared his contempt, an order can be made for discharge of the sequestration, with directions to the sequestrators to withdraw from possession, and to pass their final accounts, and after retaining their costs, &c., to pay the balance to that person.

The proceeds of the writ are dealt with by order of Court (*g*). There appears to be some doubt whether a sequestration can be issued to enforce payment of money to a person, as distinguished from payment into Court (*h*).

The writ cannot issue unless there has been an order for the payment of money, or performance of some other act within a limited time.

(*c*) *Conn* v. *Garland* (1873), 9 Ch. 101.

(*d*) *Wilson* v. *Metcalfe* (1839), 1 Beav. 263; 49 R. R. 356.

(*dd*) *Cowper* v. *Taylor* (1848), 16 Sim. 314.

(*e*) *Dixon* v. *Smith* (1818), 1 Swanst. 457; *Pelham* v. *Duchess of Newcastle* in note to *Francklyn* v. *Colhoun*, *sup.*, 3 Swanst. 290, n.

(*f*) 8 & 9 Vict. c. 127, s. 8.

(*g*) Ord. XLIII. r. 6; *Walker* v. *Bell* (1816), 2 Mad. 24; 17 R. R. 174.

(*h*) See this discussed, Anderson on Executions, 539, where the conclusion is arrived at that this doubt is not well founded.

It may be issued by leave of the Court or judge against a corporation wilfully disobeying any judgment or order (*i*).

A sequestration to enforce the payment of costs cannot be issued without leave of the Court or a judge (*k*).

(*i*) Ord. XLII. r. 31.

(*k*) Ord. XLIII. r. 7; *Hulbert* v. *Cathcart*, [1896] A. C. 470.

CHAPTER XVII.

BANKRUPTCY.

Chap. XVII.

Common law.

One creditor may, by his diligence in obtaining judgment and suing out execution thereon, obtain satisfaction of his claim in priority to the debtor's other creditors; and at common law a man who was unable to pay his debts in full could not be freed from liability even by giving up all his property to be divided among his creditors in satisfaction, so far as it would go, of their claims. If his body was taken in execution by a creditor, under a writ of *capias ad satisfaciendum* by which, formerly, the body of the debtor might be seized in execution for a judgment debt, he might remain in prison all his life; and, even if he was not imprisoned, any property that he might at any time acquire was liable to be taken from him so long as any debt remained unsatisfied.

The common law has been altered by a series of Acts commonly called "the Bankruptcy Acts." It is necessary to have a general knowledge of the effect of the repealed Acts, for the title to property is still in some cases affected by them (*a*).

"Bankrupt."

The term "bankrupt," in its original meaning, denoted a trader who secreted himself, or did certain other acts tending to defraud his creditors. The word is said to have been derived from "*bancus*," the counter of a tradesman, and "*ruptus*," broken, denoting one whose trade is gone (*b*). Under the earlier Acts (with the exception of the statute of Henry VIII. mentioned below), proceedings in bankruptcy were confined to

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(*a*) See as to the early bankruptcy law, 2 Bl. 285, 471 *et seq.*
(*b*) 2 Bl. 285, 472; 4th Instit. 277.

traders, but since 1861 (*c*), they have been extended to non-traders.

Object of Bankruptcy Acts.

The object of the earlier Acts was "to relieve the creditors of the bankrupt equally, and that there should be an equal and rateable proportion observed in the distribution of the bankrupt's goods amongst the creditors, having regard to the quantity of their several debts; so that one should not prevent the other, but all should be *in æquali jure*" (*d*).

The modern law of bankruptcy extends to non-traders, and "has for its object the distribution of an insolvent's (*e*) assets equitably among his creditors and persons to whom he is under liability; and, upon this *cessio bonorum*, to release him under certain conditions from future liability in respect of his debts and obligations" (*f*).

34 & 35 Hen. 8, c. 4.

The earliest statute (*g*) relating to bankruptcy was directed against all fraudulent debtors, whether traders or not. After reciting that divers persons "craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any of their creditors their debts and duties, but at their own wills and pleasures consume the substance obtained by credits of other men for their own pleasure and delicate living, against all reason, equity and good conscience," it goes on to authorise the Lord Chancellor and certain other great officers of State to seize and sell the property of the debtor and to distribute the proceeds rateably among his creditors.

(*c*) Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), ss. 69, 232.

(*d*) *The Case of Bankrupts* (1590), 2 Rep. 25 *b*.

(*e*) The word "insolvent" is here used in the sense of a person unable to pay his debts; but it sometimes denotes a debtor who took the benefit of the "Insolvency Acts" (*post*, p. 383), which had the same general purpose as the Bankruptcy Acts, but applied to non-traders only.

(*f*) Per James, L.J., *Ex p. Walton* (1881), 17 Ch. D. 756, cited per Cairns, C., *Hill* v. *E. & W. India Dock Co.* (1884), 9 App. Cas. 456.

(*g*) 34 & 35 Hen. 8, c. 4.

13 Eliz. c. 7.

This statute was followed by an Act (*h*), which applied to traders only, and under which the jurisdiction was vested in the Lord Chancellor alone, who was empowered to appoint commissioners to seize the persons and property of bankrupt traders and to distribute the property rateably. Proceedings under this Act were commenced by suing out a commission of bankruptcy under the Great Seal : and the property of the bankrupt vested in the commissioners, who assigned it to assignees by whom it was realised and distributed among the creditors (*i*).

4 Anne, c 17.

Neither of the Acts above mentioned contained any provision for the discharge of the bankrupt; but it was provided by 4 Anne, c. 17 (an Act amended by several subsequent statutes which require no notice in this place) that a trader who had surrendered all his effects might, with the consent of a specified number of his creditors, obtain an order of discharge, called a "certificate of conformity."

6 Geo. 4, c. 16.

All the prior Acts were consolidated and amended by the Act of 1825 (*k*). This Act retained the principle of collecting and distributing the estates of bankrupt traders by means of creditors' assignees. It was framed on the lines of the previous Acts, but it introduced the principle of deeds of arrangement, by which the debtor might avoid bankruptcy by making a composition with his creditors, subject, however, to very severe restrictions.

1 & 2 Will. 4, c. 56.
Court of Review.

In 1831 the first Court of Bankruptcy, called the Court of Review, was established (*l*). The jurisdiction of the Lord Chancellor in bankruptcy was transferred to the Court of Review, subject to an appeal to the Lord Chancellor. Official commissioners were appointed with all the powers theretofore vested in commissioners appointed by the Lord Chancellor. Proceedings in bankruptcy under this Act were commenced by the

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(*h*) 13 Eliz. c. 7.

(*i*) As to the nature of the jurisdiction of the Lord Chancellor in proceedings under this Act, see Lee & Wace, Law and Practice in Bankruptcy, 2.

(*k*) 6 Geo. 4, c. 16.

(*l*) By 1 & 2 Will. 4, c. 56, amended by 5 & 6 Will. 4, c. 29.

petition of a creditor to the Lord Chancellor, followed by the issue of a "fiat" by one of the judges or a master of the Court of Chancery authorising the creditor to prosecute his complaint in the Court of Review, or before persons named in the *fiat* who were to have all the powers of commissioners appointed under the Great Seal. A certain number of persons were to be appointed by the Lord Chancellor to act as "official assignees." All the personal estate and the rents and profits of the real estate, and the proceeds of sale of the estate, both real and personal, of the bankrupt were to be received by the official assignee alone. The "present and future real estate" of a bankrupt was to vest in the official assignee and the assignee or assignees chosen by the creditors, by virtue of their appointment, and was to shift from time to time to the assignees for the time being. The then existing law was consolidated and amended by the Bankrupt Law Consolidation Act, 1849 (*m*), which made some alterations as to deeds of arrangement. Next followed the Bankruptcy Act, 1861 (*n*), which extended the law of bankruptcy to non-traders and substituted an order of discharge for a certificate of conformity, and facilitated composition deeds.

"*Fiat.*"

"Assignees."

Act of 1849.

Act of 1861.

Prior to this Act non-traders could obtain relief from their debts while in custody for debt only by the filing of a petition to the Insolvent Debtors' Court (*o*), either by the debtor or by the creditor at whose suit the debtor was in prison. The Court then made an order vesting the debtor's property in a "provisional assignee," and had power to appoint any other persons to be assignees, on whose appointment the debtor's property passed to them for the benefit of the creditors. After examination of the debtor by the Court, he might be discharged on the terms of giving a warrant of attorney to enter up judgment for the amount of the unsatisfied debts.

Non-traders —Insolvent Debtors' Court.

(*m*) 12 & 13 Vict. c. 106.

(*n*) 24 & 25 Vict. c. 134.

(*o*) 1 & 2 Vict. c. 110, repealed, with the amending Acts, by the Act of 1861. There were several earlier Acts, the most important of which was 7 Geo. 4, c. 57.

Bankruptcy Act, 1869.

By the Bankruptcy Act, 1869 (*p*), a "trustee," in whom the property of the bankrupt was to vest (*q*), was substituted for the creditors' assignees under the former Acts, which were all repealed (*p*). A new Court, called "the London Bankruptcy Court" (*r*), was established, having jurisdiction in London and a district round it defined by reference to the Metropolitan County Courts, the jurisdiction outside these limits being given to the local County Courts. There was a chief judge who presided over the London Bankruptcy Court, and to whom appeals could be brought from County Courts. This Act was repealed by the Bankruptcy Act, 1883 (*s*), which again was amended by the Bankruptcy Act, 1890, and the Bankruptcy and Deeds of Arrangement Act, 1913.

Bankruptcy Acts, 1883, 1890, 1913, 1914 and 1926.

The existing law of bankruptcy is regulated by the Bankruptcy Act, 1914 (*t*), amended in certain particulars by the Bankruptcy (Amendment) Act, 1926 (*u*), and Rules made under the authority of these Acts, which consolidates the law relating to bankruptcy, repealing the Bankruptcy Act, 1883, and the amending Acts of 1890 and 1913. The object of these Acts is to provide that the property of a person unable to pay his debts in full shall be distributed rateably among his creditors, and that thereupon he shall be freed from his debts, either absolutely or on certain conditions. The alterations in the law made by the Act of 1883 and later legislation appear to be mainly in matters of administration, the objects being to diminish the powers hitherto given to a majority of the creditors and to put a greater controlling power in the hands of the Court, and also to enforce more careful and honest conduct on the part of debtors (*v*).

It is impossible within the limits of this work to give more than a general outline of the present law of bank-

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(*p*) 32 & 33 Vict. c. 71.
(*q*) *Ib.* ss. 14 (1), 17.
(*r*) *Ib.* ss. 59-72.
(*s*) 46 & 47 Vict. c. 52, ss. 3, 169.
(*t*) 4 & 5 Geo. 5, c. 59.
(*u*) 16 & 17 Geo. 5, c. 7.
(*v*) Per Lord Esher, M.R., *Ex p. Reed* (1886), 17 Q. B. D. 250; per Lopes, L.J., *ib.* 257.

ruptcy; we propose, however, to explain in some detail the meaning of an "act of bankruptcy" and the effect of bankruptcy on property.

Jurisdiction in bankruptcy.

The Courts having jurisdiction in bankruptcy are the High Court of Justice and the County Courts, except such of the latter as are excluded by order of the Lord Chancellor (*x*). County Courts have, for the purposes of their bankruptcy jurisdiction, all the powers of the High Court (*y*). Every Court having original jurisdiction in bankruptcy has jurisdiction all over England; and proceedings in bankruptcy may be transferred from one Court to another (*z*).

Petition.

Bankruptcy proceedings are instituted by a petition, which may be presented by a creditor or by the debtor himself (*a*). The petition is to be presented to the High Court if the debtor "has resided or carried on business (*b*) within the London Bankruptcy district (*c*) for the greater part of the six months immediately preceding the presentation of the petition, or for a longer period during those six months than in the district of any County Court, or is not in England." In any other case the petition is to be presented to the County Court for the district in which the debtor has resided or carried on business for the longest period during the six months immediately preceding the presentation of the petition (*d*).

"Receiving order."

If a debtor commits an act of bankruptcy (*e*), the Court may make a "receiving order" for the protection of the estate on the petition of a creditor or creditors to the amount of £50 presented within three months of the act of bankruptcy, or on the petition of the debtor himself alleging that he is unable to pay his debts (*f*).

(*x*) Bankruptcy Act, 1914, s. 96.

(*y*) S. 103. (*z*) S. 100. (*a*) S. 3.

(*b*) See *Ex p. Breull* (1881), 16 Ch. D. 484.

(*c*) Defined by s. 99 as the City of London and the liberties thereof, and all such parts of the metropolis and other places as are situated within the district of any metropolitan County Court (as to which see 3rd Schedule to the Act).

(*d*) S. 98.

(*e*) See s. 1. (*f*) Ss. 4, 6.

such cases depend upon express contract. The operation of a composition under the Act of 1869 was that the debtor was left in possession of his property and entitled to deal with and dispose of it as he thought fit; and, subject to the payment of the composition, he became a free man, discharged from his obligations and remitted to his former rights.

By the General Rules under the Act of 1914 (*p*), on the approval of a composition or scheme the official receiver is to put the debtor (or, as the case may be, the trustee under the composition or scheme, or the other person or persons to whom under the composition or scheme the property of the debtor is to be assigned) into possession of the debtor's property; and the receiving order must be discharged. If the composition or scheme is annulled, the property is to vest in the official receiver, unless the Court otherwise directs.

Adjudication.

When a receiving order has been made, if no composition or scheme is accepted and approved, the Court "shall adjudge" (*q*) the debtor bankrupt, and thereupon his property is to become divisible among his creditors and to vest in a trustee (*r*).

Trustee.

Until a trustee is appointed, the official receiver is the trustee, and immediately on the adjudication the property of the bankrupt vests in him as such trustee: and when a trustee other than the official receiver is appointed, the property forthwith passes to and vests in the trustee appointed (*s*). With respect, however, to property acquired after the bankruptcy, the bankrupt can, unless the trustee in bankruptcy intervenes (*t*), give a good title to a *bona fide* purchaser for value (*u*).

After-acquired property.

The trustee may be appointed by the creditors, or, on

(*p*) Bankruptcy Rules, 212, 216, 217.

(*q*) *Re Thurlow*, [1895] 1 Q. B. 724.

(*r*) S. 18.

(*s*) S. 53. See *Turquand* v. *Board of Trade* (1886), 11 App. Cas. 286.

(*t*) *Hill* v. *Settle*, [1917] 1 Ch. 319.

(*u*) S. 47. *Cohen* v. *Mitchell* (1890), 25 Q. B. D. 262; *Re Kent County Gas Light and Coke Co.*, [1909] 2 Ch. 195; *Re Behrend's Trusts*, [1911] 1 Ch. 687.

their default for four weeks, by the Board of Trade, with power for the creditors to appoint a trustee in his place (*x*).

The creditors may appoint several persons to be trustees jointly or successively (*y*).

The trustee may sue and be sued by the official name of "the trustee of the property of X, a bankrupt," and by that name may hold property of every description, make contracts, and enter into any engagements binding on himself and his successors in office (*z*).

During any vacancy in the office of trustee, the official receiver is to act as trustee (*a*).

Committee of inspection.

The creditors may also appoint a "committee of inspection," to consist of not more than five nor less than three creditors, to superintend the administration of the bankrupt's property by the trustee (*b*); and the creditors may delegate the appointment of the trustee to the committee of inspection (*c*).

Composition after adjudication.

Even after adjudication the creditors may entertain a proposal for a composition or scheme, the proceedings on which are similar to those on a composition or scheme before adjudication, and, if the Court approves, it may annul the bankruptcy and vest the property of the bankrupt in him or such other person as it may appoint (*d*); and the Court may annul the composition and adjudicate the debtor a bankrupt upon the same grounds as in the case of a composition approved before adjudication (*e*).

Discovery of debtor's property.

The Acts contain elaborate provisions as to the assistance to be given by the debtor, and by every other person supposed to be capable of giving information as to the debtor's affairs, to the official receiver or trustee with respect to the discovery or realisation of the debtor's property (*f*).

(*x*) S. 19.
(*y*) S. 77.
(*z*) S. 76.
(*a*) S. 78 (4), and s. 74 (1) (g).
(*b*) S. 20.
(*c*) S. 19 (1).
(*d*) S. 21.
(*e*) *Ante*, p. 387.
(*f*) Ss. 22-25.

Official receiver.

On the making of a receiving order an "official receiver" is thereby constituted receiver of the property of the debtor (*g*), and thereafter creditors are prohibited from taking proceedings against the debtor in respect of any debt provable in bankruptcy, except by leave of the Court (*g*).

Effect of receiving order.

A receiving order does not divest the debtor of his property, nor make him a bankrupt, nor place him under the disabilities of an adjudicated bankrupt. Notwithstanding a receiving order, the debtor is the only person who can sue for the recovery of what belongs to him, and what he recovers in the action is his property, both legally and equitably, although he must, when he recovers it, hand it over to the official receiver for the benefit of his creditors, if he does not pay or compound with them (*h*).

First meeting of creditors.

As soon as may be after the receiving order a "first meeting of creditors" is held to consider whether a proposal for a composition or scheme of arrangement shall be entertained, or whether it is expedient that the debtor shall be adjudged bankrupt (*i*). The debtor has to submit to the official receiver a statement of his affairs showing his assets and liabilities (*k*), and is examined at a public sitting of the Court as to his conduct, dealings, and property (*l*).

Composition or scheme of arrangement.

The debtor may, within four days after submitting his statement of affairs, or within such extended time as the official receiver may fix, lodge with the official receiver a proposal in writing embodying the terms of a composition or scheme of arrangement of his affairs which he is desirous of submitting for the consideration of his creditors. Thereupon a meeting of creditors is to be held before the public examination is concluded, and, if the proposal for the composition or scheme is accepted

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(*g*) S. 7.

(*h*) Per Lindley, L.J., *Rhodes* v. *Dawson* (1886), 16 Q. B. D. 553; *Re Berry*, [1896] 1 Ch. 939.

(*i*) S. 13.

(*k*) S. 14.

(*l*) S. 15.

at that meeting by a majority in number and three-fourths in value of the creditors who have proved, it will, when approved by the Court, be binding on all the creditors. An application to the Court for approval is not to be heard until after the public examination is concluded, and the Court, before approving the proposal, must hear a report of the official receiver as to its terms and as to the conduct of the debtor, and any objections made by any creditor. In certain cases (for example, if the terms are not reasonable) the Court must refuse (*m*), and in other cases it may either approve or refuse to approve the proposal. When a composition or scheme is accepted and approved, it binds all the creditors so far as relates to debts provable in bankruptcy, but does not release the debtor from certain specified liabilities, except as expressly ordered by the Court. There is power, in case of default of payment of any instalments under the composition or scheme, or if it appears to the Court that the composition or scheme cannot proceed without injustice or delay, or that the approval was obtained by fraud, to adjudge the debtor bankrupt and to annul the composition or scheme without prejudice to anything done under it (*n*).

Composition distinguished from bankruptcy.

The rights of creditors and of the debtor under a composition are different from those under a bankruptcy.

At common law a debt could not be satisfied by the payment, by agreement, of a smaller sum of money: but, where an arrangement is made between a debtor and his creditors or some of them that he shall pay, and that they shall take, smaller sums than those actually due in satisfaction of their debts, the consideration for each creditor giving up part of his debt is the giving up of part of their debts by the other creditors (*o*), and the arrangement is valid at common law irrespective of statute, so that the rights of the creditors and debtor in

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(*m*) See *Re Webb*, [1914] 3 K. B. 387.

(*n*) S. 16.

(*o*) *Good* v. *Cheesman* (1831), 2 B. & Ad. 328; 36 R. R. 374. Per Ld. Blackburn, *Société Générale* v. *Geen*, (1883), 8 App. Cas. 614; *Couldery* v. *Bartrum* (1882), 19 Ch. D. 399.

Discharge of bankrupt.

At any time after adjudication the bankrupt may apply for an order of discharge, but the application is not to be heard until after the public examination of the bankrupt is concluded. On hearing the application the Court is to consider the report of the official receiver as to the bankrupt's conduct and affairs, and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order subject to conditions as to the future earnings or income or after-acquired property of the bankrupt. But if the debtor has committed certain criminal offences in connection with his bankruptcy (*g*), or, on the proof of certain facts, the most important of which is that his assets do not amount to 10s. in the pound on his unsecured liabilities (unless this fact arises from circumstances for which he cannot justly be held responsible), the Court must either refuse the discharge, or suspend it for such time as the Court thinks proper, or suspend it till a dividend of not less than 10s. in the pound has been paid to the creditors, or require the bankrupt to consent to judgment being entered up against him for the balance or part of the balance of the unsatisfied provable debts to be paid out of his future earnings or after-acquired property, but so that execution is not to be issued without leave of the Court (*h*).

Debts provable.

Debts provable under the bankruptcy are "all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order" (*i*). But they do not include "demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust" (*k*). A person having notice of an act of bankruptcy available against the debtor cannot

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(*g*) *Re Hedley*, [1895] 1 Q. B. 923.

(*h*) S. 26, as amended by Bankruptcy (Amendment) Act, 1926, s. 1; *Re Gaskell*, [1904] 2 K. B. 478.

(*i*) S. 30 (3).

(*k*) S. 30 (1).

prove for any debt or liability contracted by the debtor subsequently to such notice (*l*). The debtor is, however, released from such a debt by his discharge, for it is a "debt provable in bankruptcy," although the creditor cannot, under the circumstances, prove (*m*).

Mutual credits.

Where there have been mutual credits or debts or dealings, there is a set-off, and the creditor may prove for, or pay, the balance, as the case may be (*n*).

Priority of debts.

Rates and taxes not exceeding one year's assessment, and the wages or salary of a clerk or servant (*o*) during four months before the receiving order, and not exceeding £50, and the wages of a labourer or workman during two months before the receiving order, and not exceeding £25, are to be paid in full in priority to all other debts (*p*). Provision is also made for preferential claims by apprentices or articled clerks with respect to premiums (*q*), for the preferential right of a landlord to distrain for six months' rent (*r*), for sums due as compensation to a workman under the Workmen's Compensation Act, 1925 (*s*), and for contributions of employers under the National Health Insurance Act, 1924 (*t*), and the Unemployment Insurance Acts, 1920-1927.

Secured creditors.

A "secured" creditor, *i.e.*, "a person holding a mortgage, charge or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor" (*u*), may either—

(1.) Rely on his security, and not prove; or

(2.) Realise his security and prove for the balance of his debt; or

(3.) Surrender his security and prove for his whole debt; or

(*l*) S. 30 (2).

(*m*) *Buckwell* v. *Norman*, [1898] 1 Q. B. 622.

(*n*) S. 31.

(*o*) *Cairney* v. *Back*, [1906] 2 K. B. 746.

(*p*) S. 33.

(*q*) S. 34.

(*r*) S. 35 (1).

(*s*) Workmen's Compensation Act, 1925, s. 7.

(*t*) Bankruptcy Act, 1914, s. 33; National Health Insurance Act, 1924, s. 133; Unemployment Insurance Act, 1920, s. 26.

(*u*) Act of 1914, s. 167.

(4.) Assess the value of his security and receive a dividend in respect of the balance: in which case the trustee may redeem the security on payment of the assessed value, or require the property to be sold (*x*).

Deferred debts.

When a loan has been made to the bankrupt in connection with his business on a contract that the lender shall receive interest varying with the profits or shall receive a share of the profits, or where the goodwill of a business has been sold to the bankrupt in consideration of a share of the profits, the lender or seller of the goodwill, as the case may be, is not allowed to receive a dividend in respect of such claims until the claims of the other creditors of the bankrupt for valuable consideration in money or money's worth have been satisfied (*y*).

Where a married woman has been adjudged bankrupt, her husband is not entitled to claim in her bankruptcy as a creditor in respect of any money or other property lent or entrusted by him to her for the purposes of her trade or business until all claims of other creditors for valuable consideration in money or money's worth have been satisfied; and, similarly, a claim for money or other property belonging to a married woman, lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, will be postponed in his bankruptcy until all claims of other creditors for valuable consideration have been satisfied (*z*).

Acts of bankruptcy.

Acts of bankruptcy (*a*) may be divided into three classes (*b*):—(A.) Personal acts or defaults on the part of the debtor; (B.) Dealings with his property; (C.) Acts which show the insolvent state of his affairs.

Personal acts or defaults.

(A.) Personal acts or defaults of the debtor, done or

(*x*) Act of 1914, Sched. II., rr. 10-14.

(*y*) Partnership Act, 1890, s. 3.

(*z*) Bankruptcy Act, 1914, s. 36. See *Re Cronmire*, [1901] 1 K. B. 480. Cf. *Re Slade*, [1921] 1 Ch. 160. For another instance of deferred claims, see *post* p. 408.

(*a*) Ss. 1 and 2.

(*b*) Baldwin on Bankruptcy.

made with the intention of defeating or delaying his creditors (*c*), consist of—

(1.) Departing out of England (*d*);

(2.) Remaining out of England (*e*);

(3.) Departing from his dwelling-house (*f*);

(4.) Otherwise absenting himself (*g*);

(5.) Beginning to keep house (*h*).

Dealings with property

(B.) Dealings by the debtor with his property (*i*). These consist of—

—(1) Conveyance to trustee for creditors.

(1.) Any conveyance or assignment (*k*) in England or elsewhere (*l*) by the debtor of his property to a trustee or trustees for the benefit of his creditors generally. The conveyance or assignment must be of the whole, or substantially the whole, of the debtor's property (*m*); and for the benefit of the creditors *generally* and not merely of particular creditors or a particular class of creditors (*n*). A creditor who has assented thereto cannot avail himself of

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(*c*) Act of 1914, s. 1 (1) (d). The intention is essential and must be alleged in the petition: *Re Skelton* (1877), 5 Ch. D. 579; it is immaterial whether, as a matter of fact, the creditors are or are not (*Williams* v. *Nunn* (1809), 1 Taunt. 270; *Chenoweth* v. *Hay* (1813), 1 M. & S. 676) delayed.

(*d*) As to a foreigner returning home, see *Ex p. Crispin* (1873), 8 Ch. 374; *Ex p. Gutierrez* (1879), 11 Ch. D. 298.

(*e*) *Ex p. Bunny* (1857), 1 De G. & J. 309. As to a debtor domiciled abroad, see *Ex p. Brandon* (1884), 25 Ch. D. 500.

(*f*) See *Re McKeand* (1889), 6 Morr. 240; *Re Stanger* (1882), 22 Ch. D. 436.

(*g*) See *Ex p. Meyer* (1871), 7 Ch. 188; *Chenoweth* v. *Hay*, *sup.*; *Bernasconi* v. *Farebrother* (1830), 10 B. & C. 549; *Russell* v. *Bell* (1842), 10 M. & W. 340; 62 R. R. 639; *Re Alderson*, [1895] 1 Q. B. 183; *Re Worsley*, [1901] 1 K. B. 309.

(*h*) *E.g.*, a denial to creditors, sanctioned by the debtor; *Muchlow* v. *May* (1809), 1 Taunt. 479; *Richardson* v. *Pratt* (1885), 52 L. T. 614.

(*i*) Act of 1914, s. 1 (1), (a), (b), (c).

(*k*) *Re Spackman* (1890), 24 Q. B. D. 728; *Re Hughes*, [1893] 1 Q. B. 595.

(*l*) *Ex p. Crispin*, *sup.* See *Re Gunsbourg*, [1918] B. & C. R. 108; *Re Fasey*, [1923] 2 Ch. 1.

(*m*) *Re Spackman*, *sup.*; *Re Hughes*, *sup.*

(*n*) *Re Phillips*, [1900] 2 Q. B. 329; see *Re Saumarez*, [1907] 2 K. B. 170.

the conveyance as an act of bankruptcy (*o*). Sometimes such a conveyance may be set aside under 13 Eliz. c. 5 (*p*).

—(2) Fraudulent conveyances or gifts.

(2.) Fraudulent conveyance, gift, delivery, or transfer in England or elsewhere (*pp*) by the debtor of his property, or of any part thereof.

Dispositions may be fraudulent either under s. 172 of the Law of Property Act, 1925, or under the bankruptcy laws.

A mortgage of all, or substantially all, a man's property to secure an existing debt (*q*), unless the mortgage is made in pursuance of a *bonâ fide* agreement made at the time of the advance (*r*), is fraudulent. On the other hand, a mortgage of all a man's property for a substantial present advance (*s*), or for a past debt and a substantial present advance, in order to enable the debtor to continue his business (*t*), or for a past debt and further advances agreed to be made, and in fact made (*u*), is not fraudulent. Of course, a *bonâ fide* sale of the whole of a man's property is not fraudulent (*x*).

—(3) Fraudulent preferences.

(3.) Conveyance or transfer in England or elsewhere (*y*) by the debtor of his property or any part thereof, or the creation of any charge thereon, which conveyance, transfer, or charge would, under the Act of 1914, or any other Act, be void as a fraudulent preference, if the debtor were adjudged bankrupt (*z*).

Definition.

A fraudulent preference is "every conveyance or

(*o*) *Ex p. Stray* (1867), 2 Ch. 374; *Re Brindley*, [1906] 1 K. B. 377; *Ex p. Newbury's, Ltd.* (1926), 95 L. J. Ch. 199.

(*p*) Repealed and re-enacted in substance by s. 172 of L. of P. Act, 1925. *Ante*, p. 113.

(*pp*) See note (*l*), *ante*.

(*q*) *Ex p. Ellis* (1876), 2 Ch. D. 797; *Re Sinclair* (1884), 26 Ch. D. 319.

(*r*) *Ex p. Hauxwell* (1883), 23 Ch. D. 626; see *Re Jackson and Bassford*, [1906] 2 Ch. 467; *Re Davies*, [1921] 3 K. B. 628.

(*s*) *Morris* v. *Morris*, [1895] A. C. 625.

(*t*) *Ex p. Ellis*, *sup.*; *Ex p. Johnson* (1884), 26 Ch. D. 338; *Jamaica, Adm.-Gen. of* v. *Lascelles*, [1894] A. C. 135.

(*u*) *Ex p. Dann* (1881), 17 Ch. D. 26.

(*x*) *Ex p. Stubbins* (1881), 17 Ch. D. 58.

(*y*) See *Ex p. Crispin*, *sup.*

(*z*) S. 1 (1) (c).

transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors" (*a*). Every such conveyance, &c., is to be deemed fraudulent and void against the trustee in the bankruptcy of the person making it if he be adjudged bankrupt on a petition presented within three months thereafter (*a*).

"View to prefer."

We have already pointed out that the necessary consequence of a conveyance of the whole of a debtor's property as security for a past debt is to delay his creditors, and is therefore fraudulent; but a conveyance of part only of his property for that purpose is not necessarily fraudulent within the provisions above referred to. The main difficulty in cases alleged to fall within these provisions is to ascertain whether the payment, &c. was made substantially with the view to prefer the creditor (*b*) to whom it was made (*c*), as distinguished from a payment, &c. made under real pressure by the creditor (*d*), or made in the ordinary course of trade (*e*), or according to a promise to pay on a particular day (*f*), or under a threat of proceedings (*g*), or in order to correct a mistake made in a former security (*h*).

Where a trustee who has misappropriated trust funds replaces them (*i*), or a person duly applies money given to him for a particular purpose (*k*), this is not a fraudulent preference.

(*a*) S. 44.

(*b*) *Ex p. Taylor* (1886), 18 Q. B. D. 295; *Re Vautin*, [1900] 2 Q. B. 325.

(*c*) *Re Warren*, [1900] 2 Q. B. 138.

(*d*) *Re Wilkinson* (1884), 1 Morr. 65; *Ex p. Jenkins* (1885), 2 *id.* 71.

(*e*) *Tomkins* v. *Saffery* (1878), 3 App. Cas. 235.

(*f*) *Bills* v. *Smith* (1866), 6 B. & S. 314.

(*g*) *Re Wilkinson, sup.*

(*h*) *Re Tweedale*, [1892] 2 Q. B. 217.

(*i*) *Ex p. Stubbins* (1881), 17 Ch. D. 58; *Ex p. Taylor, sup.*; *Sharp* v. *Jackson*, [1899] A. C. 419; *Re Lake*, [1901] 1 K. B. 710.

(*k*) *Ex p. Kelly* (1878), 11 Ch. D. 306.

Acts showing insolvency.

(C.) Acts which show that the debtor is insolvent.

These are (*l*):—

Declaration of insolvency.

(1.) Filing by the debtor in the Court a declaration of his inability to pay his debts, or presentation by him of a bankruptcy petition against himself.

Execution.

(2.) That execution issued against him has been levied by seizure of his goods (*m*) under process in an action in any Court or in any civil proceeding in the High Court (*n*), and the goods have either been sold or held by the sheriff for twenty-one days (*o*).

Bankruptcy notice.

(3.) That a creditor has obtained a final judgment, or final order, against him for any amount, and, execution thereon not having been stayed (*p*), has served on him in England, or by leave of the Court elsewhere, a "bankruptcy notice" under the Act, requiring him to pay the judgment debt in accordance with the terms of the judgment or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counterclaim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained (*q*).

The judgment must have been obtained in England (*r*). Any person who is for the time being entitled to enforce the judgment, *i.e.*, an assignee, may serve the notice (*s*);

(*l*) Act of 1914, s. 1 (1) (f), (g), (h).

(*m*) "Goods" are defined, by s. 167, as meaning all chattels personal, and therefore they include choses in action; *Colonial Bank* v. *Whinney* (1886), 11 App. Cas. 434.

(*n*) *Ex p. Caucasian Co.*, [1896] 1 Q. B. 368.

(*o*) S. 1 (1) (e). *Burns-Burns' Trustee* v. *Brown*, [1895] 1 Q. B. 324.

(*p*) *Ex p. Ford* (1886), 18 Q. B. D. 369; *Re Connan* (1888), 20 Q. B. D. 690; *Re Bond*, [1911] 2 K. B. 988.

(*q*) S. 1 (1) (g).

(*r*) *Re A Bankruptcy Notice*, [1898] 1 Q. B. 383.

(*s*) S. 1 (1) (g); *Re Clements*, [1901] 1 K. B. 260; *Re Macoun*, [1904] 2 K. B. 700.

and a judgment creditor who has made an equitable assignment may do so (*t*); but not a judgment creditor who has agreed not to enforce the judgment (*u*).

If the time for payment has expired and no application has been made to set aside the notice, the act of bankruptcy is complete, and it is not safe for the creditor to accept payment.

Notice of suspension of payment.

(4.) Notice by the debtor to any of his creditors that he has suspended or is about to suspend payment of his debts (*x*).

Any notice will be sufficient which is expressed in terms calculated to convey to the creditor the information that the debtor has suspended or is about to suspend payment (*y*). A declaration of his inability to pay his debts may be made in terms and under circumstances which do not suggest that he means to stop payment; but it may be so expressed as clearly to imply that he does not mean to pay his debts in full, in which case it will be an act of bankruptcy (*y*). The notice may be given orally (*z*). This applies to non-traders as well as to traders (*a*).

Property divisible amongst creditors; —Excepted property,

The property of a bankrupt divisible among his creditors does not comprise (*b*)—

(1.) Property held by the bankrupt on trust for any other person;

(2.) The tools (if any) of his trade and the necessary wearing apparel and bedding for himself, his wife and children, to a value, inclusive of tools and apparel and bedding, not exceeding £20 in the whole.

But it does comprise (*b*)—

—Property divisible.

(i.) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge (*c*); and

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(*t*) *Re Palmer*, [1898] 1 Q. B. 419.
(*u*) *Re A Debtor*, [1908] 1 K. B. 344.
(*x*) Act of 1914, s. 1 (1) (h).
(*y*) *Crook* v. *Morley*, [1891] A. C. 316.
(*z*) *Ex p. Nickoll* (1884), 13 Q. B. D. 469. See also *Re Miller*, [1901] 1 K. B. 51.
(*a*) *Re Scott*, [1896] 1 Q. B. 619. (*b*) Act of 1914, s. 38.
(*c*) *Nichols to Nixey* (1886), 29 Ch. D. 1005.

> (ii.) The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice.

But a general power of appointment to which the debtor was entitled cannot be exercised by the trustee after the debtor's death (*cc*), nor can the trustee release a special power of appointment possessed by the debtor, in order to make the property available for the creditors in default of appointment (*d*); and, where the power is only exercisable by will, if the bankrupt exercises the power in his will, the trustee cannot claim the property on the bankrupt's death (*e*). But if the bankrupt dies without having obtained his discharge, the creditors may, perhaps, claim in the administration of his estate, unless their debts have become barred by lapse of time (*f*).

> (iii.) All goods being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action, other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section.

Commencement of bankruptcy—relation back of trustee's title.

The phrase "commencement of the bankruptcy" requires explanation. The bankruptcy of the debtor is deemed "to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against the bankrupt, or, if he is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt

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(*cc*) *Nichols to Nixey* (1886), 29 Ch. D. 1005.
(*d*) *Re Rose*, [1904] 2 Ch. 348; [1905] 1 Ch. 94.
(*e*) *Re Guedalla*, [1905] 2 Ch. 331; *Re Benzon*, [1914] 2 Ch. 68
(*f*) *Re Benzon*, *sup.*

within three months next preceding the date of the presentation of the bankruptcy petition" (*g*).

The practical result is that after the lapse of three months an act of bankruptcy is not available, *i.e.*, the rights of all persons are the same as if it had not been committed (*h*).

The trustee can transfer the bankrupt's stock, shares in ships, shares or other property transferable in the books of any company, office, or person, in the same manner as the bankrupt might have done if he had not become bankrupt (*i*); and the choses in action of the bankrupt are to be deemed to have been duly assigned to the trustee (*k*).

Reputed ownership—order and disposition.

The provisions as to goods "in the possession, order, or disposition of the bankrupt" (*l*) sometimes called "reputed ownership," have been practically the same in all the Acts commencing with 21 Jac. 1, c. 19, except that they are now expressly confined to goods in the possession, order, or disposition of the bankrupt "in his trade or business" (*m*).

The corresponding provision in the Act of 1869 (s. 15, sub-s. 5) applied to traders only, but did not contain the words "in his trade or business," and therefore it had a less extensive operation as to persons, but a more extensive operation as to the property affected by it. Of that provision it was said (*n*) that it "must be read, as the similar provision in the bankruptcy statutes from the time of James I. has always been read, with some attention to common sense. It has always been construed as meaning this: that, if goods are in a man's possession, order, or disposition under such circum-

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(*g*) S. 37. See also s. 107 (4). Under the Act of 1869, the bankruptcy might, under certain circumstances, relate back to any act of bankruptcy committed within twelve months.

(*h*) See also s. 4 (1) (c).

(*i*) S. 48 (3).

(*k*) S. 48 (5).

(*l*) S. 38 (c). See *ante*, p. 119, as to the history of these provisions.

(*m*) See *Re Jenkinson* (1885) 15 Q. B. D. 441.

(*n*) Per James, L.J., *Ex p. Wingfield* (1878), 10 Ch. D. 594.

stances as to enable him by means of them to obtain false credit, then the owner of the goods who has permitted him to obtain that false credit is to suffer the penalty of losing his goods for the benefit of those who have given the credit."

These provisions do not extend to the case of factors who have possession of other men's goods merely as trustees or under a bare authority to sell them for their principal (*o*).

Lord Redesdale observed (*p*), commenting on an Irish Act couched in similar language :—

> " Now, that clause refers to chattels in the possession of the bankrupt; 'in his order and disposition with consent of the true owner'; that means, where the possession, order, and disposition is in a person who is not the owner, to whom they do not properly belong, and who ought not to have them, but whom the owner permits unconscientiously, as the Act supposes, to have such order and disposition. The object was to prevent deceit by a trader from the visible possession of a property to which he was not entitled: but in the construction of the Act the nature of the possession has always been considered, and the words have been construed to mean possession of the goods of another with the consent of the true owner. . . . In all those cases in which that clause in the Act has been permitted to have the effect of divesting the right in the person who had a right to the property, the nature of the possession has always been considered, and whether it was according to right. In cases of specific chattels, which are settled on marriage upon the husband for life, and then on the children, the possession has been with the party, the bankrupt, with the consent of the person creating the trust, and, so far, with the consent of the true owner; but the possession was according to the title, qualified by the rights of others; and wherever that has been the case, I take it, the law has never been construed to extend to destroy that right of property; but it has been confined to those cases where the sole and absolute owner of the property has permitted it to remain in possession of the trader, in whose possession it ought not to be."

Trade or business.

The Act contains no definition of "trade or business." Mere buying or selling occasionally is not

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(*o*) *Ex p. Bright* (1878), 10 Ch. D. 566; *Barber & Sons* v. *Rigley* (1922), 38 T. L. R. 650.

(*p*) *Joy* v. *Campbell* (1803), 1 Sch. & Lef. 336. See also *Colonial Bank* v. *Whinney* (1886), 30 Ch. D. 274, 280; 11 App. Cas. 443; *Re Watson & Co.*, [1904] 2 K. B. 753; *Re Button*, [1907] 2 K. B. 180.

a "trade or business"; probably there must be an intention to buy and sell constantly and to make a livelihood thereby (*q*), and the "trade or business" must be carried on at the commencement of the bankruptcy (*r*).

"Goods" means chattels personal (*s*), including ships (*t*), but excluding fixtures (*u*), growing crops, and choses in action (*x*), other than "debts due or growing due to the bankrupt in the course of his trade or business" (*y*).

"Debts due or growing due to the bankrupt in the course of his trade or business" include debts already contracted, whether immediately payable or not, as distinguished from contingent debts (*z*).

"Possession, order, or disposition."

There is some difficulty in defining "possession, order, or disposition." The words include cases where the property is in the custody of a servant of the bankrupt (*a*), or is in the possession of a person to whom he has lent it (*b*), or of a warehouseman, hirer, or carrier for him; but not where it is in the possession of his pawnee, or of a creditor having a possessory lien, or (probably) of the sheriff who has taken it in execution, or of a bailiff under a distress, or of a receiver appointed by the Court (*c*).

The goods must be in the bankrupt's sole possession. Goods in the possession of a bankrupt jointly with another person are not in his order and disposition, as, for example, goods belonging to a firm are not in the

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(*q*) *Re Wallis* (1885), 14 Q. B. D. 950.

(*r*) *Ex p. M'George* (1882), 20 Ch. D. 697; *Ex p. Salaman* (1882), 21 Ch. D. 394.

(*s*) S. 167.

(*t*) But the Merchant Shipping Act, 1894, s. 36, protects a registered mortgagee.

(*u*) See *Horwich* v. *Symond* (1915), 84 L. J. K. B. 1083.

(*x*) A share in a company is a chose in action for the purposes of this section: *Colonial Bank* v. *Whinney* (1886), 11 App. Cas. 426.

(*y*) S. 38.

(*z*) *Re Neal*, [1914] 2 K. B. 910.

(*a*) *Jackson* v. *Irvin* (1809), 2 Camp. 48; 11 R. R. 658.

(*b*) *Ex p. Roy* (1877), 7 Ch. D. 70.

(*c*) *Taylor* v. *Eckersley* (1877), 5 Ch. D. 740.

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order and disposition of one of the partners who becomes bankrupt (*d*).

Where the property in goods at sea is changed by indorsement and delivery of the bills of lading (*e*), or where the possession of goods is changed by giving a delivery order and the attornment of the bailee (*f*), the goods are no longer in the order or disposition of the person transferring the bill of lading or giving the delivery order. The mere transfer of the delivery order may take the goods out of his order or disposition in cases where by the custom of the trade the bailee will not deliver up the goods without the production of the order (*g*).

A debt remains in the order and disposition of the creditor after an assignment by him until notice of the assignment is given to the debtor, on the ground that, until such notice is given, the creditor is able to obtain payment of the debt to himself, and that the assignee, who is the true owner, has given his consent to the reputation of ownership remaining in the assignor (*h*).

Consent.

The " consent of the true owner " is determined by his demanding possession of the goods, even if he is unable to obtain possession : and the demand is sufficient if made to the bankrupt at a time when the goods are in a warehouse (*i*).

The " consent " must be to possession as reputed owner (*k*).

It follows that, if the possession is obtained by fraud, or if it is given to the bankrupt for a special purpose only, the case is not within the Act.

The consent can only be given by a person capable

(*d*) *Ex p. Dorman* (1872), 8 Ch. 51; *Ex p. Fletcher* (1878), 8 Ch. D. 218.

(*e*) *Ante*, p. 87.

(*f*) *Ante*, p. 89.

(*g*) *Simeons & Co.* v. *Durand's Trustee*, [1928] 2 K. B. 66.

(*h*) *Rutter* v. *Everett*, [1895] 2 Ch. 872; *Re Seaman*, [1896] 1 Q. B. 412; *Re Goetz*, [1898] 1 Q. B. 787.

(*i*) *Ex p. Ward* (1872), 8 Ch. 144.

(*k*) *Re Watson*, [1904] 2 K. B. 753; *Sharman* v. *Mason*, [1899] 2 Q. B. 679; *Re Kaufman, Segal and Domb*, [1923] 2 Ch. 89; *Lamb* v. *Wright & Co.*, [1924] 1 K. B. 857.

of giving it, and not, for instance, by an infant or a married woman restrained from anticipation (*l*).

True owner.

In order to bring a case within the section there must be a true owner, as distinguished from an apparent owner (*m*). Where the goods are in the possession of a trustee on an express trust, or of an executor or administrator, he is the true owner, and the section does not apply. If, however, he consents to the property being in the order and disposition of another who becomes bankrupt, the section applies (*n*). Trustees who have not accepted the trust or executed the trust deed are not, but the beneficiaries are, the true owners (*o*).

Where a *cestui que trust* is placed in possession of specific chattels settled on him for life, the section does not apply (*p*).

Mortgagee true owner.

Where goods are mortgaged, the mortgagee is the true owner (*q*). Where the grantor of a bill of sale within the Bills of Sale Act, 1882 (*r*), remains in possession as reputed owner, the section applies (*s*). But it does not apply to the grantor of a bill of sale duly registered under the Act of 1878, *i.e.*, a bill of sale other than one given as security for the payment of money (*t*).

And lastly, the question whether goods are in the "order and disposition" of a man, in other words, whether he is the reputed owner, is a question of fact (*u*).

Lord Selborne, C., says (*x*):

> "The doctrine of reputed ownership does not require any investigation into the actual state of knowledge or belief, either

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(*l*) *Re Mills*, [1895] 2 Ch. 564.

(*m*) *Joy* v. *Campbell* (1804), 1 Sch. & Lef. 328; 9 R. R. 39.

(*n*) *Ex p. Dale*, Buck, 365.

(*o*) *Re Mills*, *sup.*

(*p*) *Joy* v. *Campbell*, *sup.*

(*q*) *Ryall* v. *Rowles* (1750), 1 Ves. sen. 348; 1 W. & T. L. C. (ed. 9) 90; *Colonial Bank* v. *Whinney* (1885), 30 Ch. D. 281.

(*r*) *Ante*, p. 129.

(*s*) *Re Ginger*, [1897] 2 Q. B. 461. See *Re Weibking*, [1902] 1 K. B. 713.

(*t*) Bills of Sale Act, 1878, s. 20; *Swift* v. *Pannell* (1883), 24 Ch. D. 210.

(*u*) *Re Watson*, [1904] 2 K. B. 753; *Re Kaufman, Segal and Domb*, [1923] 2 Ch. 89.

(*x*) *Ex p. Watkins* (1872), 8 Ch. 528.

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of all creditors or of particular creditors, and still less of the outside world, who are no creditors at all, as to the position of particular goods. It is enough for the doctrine if those goods are in such a situation as to convey to the minds of those who know their situation the reputation of ownership, that reputation arising by the legitimate exercise of reason and judgment on the knowledge of those facts which are capable of being generally known to those who choose to make inquiry on the subject. It is not at all necessary to examine into the degree of actual knowledge which is possessed, but the Court must judge from the situation of the goods what inference as to the ownership might be legitimately drawn by those who knew the facts. I do not mean the facts that are only known to the parties dealing with the goods, but such facts as are capable of being, and naturally would be, the subject of general knowledge to those who take any means to inform themselves on the subject. So, on the other hand, it is not at all necessary, in order to exclude the doctrine of reputed ownership, to show that every creditor, or any particular creditor, or the outside world who are not creditors, knew anything whatever about particular goods, one way or the other. It is quite enough, in my judgment, if the situation of the goods was such as to exclude all legitimate ground from which those who knew anything about that situation could infer the ownership to be in the person having actual possession."

Notwithstanding these remarks, it appears to be settled—

Where goods originally belong to bankrupt.

First. That where goods originally belong to the bankrupt, the fact that he remains in possession till he commits the act of bankruptcy is *prima facie* evidence that he continues in possession as reputed owner (*y*).

The rule is subject to the following exceptions :—

(a.) Where the goods were made by him to order, unless it was his course of business to make goods of that nature and to keep them on his premises for sale (*z*).

(b.) Where the change of ownership is notorious, as by the purchaser's name, or seal, or a notice, being so placed as to show that the goods belong to him (*a*).

(*y*) *Ex p. Lovering* (1873), 9 Ch. 621; *Ex p. Brooks* (1883), 23 Ch. D. 261.

(*z*) *Wilkins* v. *Bromhead* (1844), 7 Scott, N. R. 921.

(*a*) *Ex p. Watkins*, *sup.*

(c.) Where the goods are sold but not delivered, and there is a notorious (*b*) custom in the trade to leave them in the hands of the seller, or in the warehouse in which they were at the time of sale (*c*).

Where goods did not originally belong to bankrupt.

Secondly. Where the goods did not originally belong to the bankrupt, the goods are not in his order and disposition :—

(a.) Where he has hired them and there is a well-known custom in his trade to hire such goods (*d*).

(b.) Where he hires a furnished house (*e*).

(c.) In case of agistment (*f*).

(d.) Where there is a well-known custom in the trade to send goods on sale or return (*g*), or for sale on commission (*h*), or for the purpose of having work done upon them (*i*).

(e.) Where an unfinished chattel is in the hands of a manufacturer in the course of his trade (*k*).

Assignment of book debts.

Before 1914, an assignment of book debts, present or future, was subject to the ordinary rules as to assignment of choses in action, and was valid against the trustee in bankruptcy (*l*), unless the debts came within the order and disposition principle, or the assignment was voidable on the ground of fraud or otherwise. The Act of 1914 (*m*), reproducing sect. 14 of the Bankruptcy and Deeds of Arrangement Act, 1913, now provides that where any person engaged in any trade

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(*b*) *Re Goetz*, [1898] 1 Q. B. 787.

(*c*) *Ex p. Watkins, sup.; Ex p. Vaux* (1873), 9 Ch. 602.

(*d*) *Ex p. Powell* (1875), 1 Ch. D. 501; *Crawcour* v. *Salter* (1881), 18 *id.* 30; *Ex p. Turquand* (1885), 14 Q. B. D. 636; *Re Tabor*, [1920] 1 K. B. 808; *Re Kaufman, Segal and Domb*, [1923] 2 Ch. 89.

(*e*) *Walker* v. *Burnell* (1778), Doug. 303.

(*f*) *Re Woodward* (1886), 54 L. T. 683.

(*g*) *Ex p. Wingfield* (1878), 10 Ch. D. 591.

(*h*) *Re Ford*, [1929] 1 Ch. 134, 137.

(*i*) *Harris* v. *Truman* (1882), 9 Q. B. D. 264.

(*k*) *Clarke* v. *Spence* (1836), 4 A. & E. 448; 43 R. R. 395.

(*l*) *Ante*, p. 159. *Tailby* v. *Official Receiver* (1888), 13 A. C. 523.

(*m*) S. 43.

or business makes an assignment of his existing or future book debts (whether the assignment be absolute or by way of security), and is subsequently adjudicated bankrupt, the assignment shall be void against the trustee as regards any book debts which have not been paid at the commencement of the bankruptcy, unless the assignment has been registered as if the assignment were a bill of sale given otherwise than by way of security for the payment of a sum of money, *i.e.*, under the Bills of Sale Act, 1878 (*n*).

This is not to apply to an assignment (i) of book debts due at the date of assignment from specified debtors; (ii) of debts growing due under specified contracts; (iii) of book debts included in the transfer of a business made *bona fide* and for value; or (iv) an assignment of assets for the benefit of creditors generally.

Executions.

A creditor who has issued execution against the property of a debtor, or has attached any debt due to him, cannot retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless it has been completed before the receiving order, and before notice of the presentation of the bankruptcy petition, or of any available act of bankruptcy (*o*). An execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or by the appointment of a receiver (*p*). These provisions are not applicable in the case of an administration order under sect. 130 (*q*).

When goods are seized in execution, and before sale or completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff of a receiving order against the debtor, the sheriff must deliver the goods and any money seized or received

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(*n*) *Ante*, pp. 122 *et seq.*

(*o*) S. 40 (1).

(*p*) S. 40 (2). See *Wild* v. *Southwood*, [1897] 1 Q. B. 317; *Re Ford*, [1900] 1 Q. B. 264.

(*q*) *Post*, p. 411. *Hasluck* v. *Clark*, [1899] 1 Q. B. 699; *Johnson* v. *Pickering*, [1908] 1 K. B. 1.

to the official receiver (*r*). If the execution is on a judgment exceeding £20 (*s*), and the goods are sold or money paid to avoid sale (*t*), the sheriff must retain the net proceeds for fourteen days; if, within that time, notice is served on him of a bankruptcy petition, and a receiving order against the debtor is made thereon, or on any other petition of which the sheriff has notice, he must pay such proceeds to the official receiver or trustee (*u*).

An execution levied by seizure and sale on the goods of a debtor is not invalid by reason only of its being an act of bankruptcy; and a person who purchases in good faith from the sheriff acquires a good title against the trustee (*x*).

The Act of 1914 provides (*y*) that :—

Avoidance of settlements;

> (1.) Any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within *two* years after the date of the settlement, be void against the trustee in the bankruptcy; and shall, if the settlor becomes bankrupt at any subsequent time within *ten* years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement (*z*), and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof.

—of covenants to settle after-acquired property.

> (2.) Any covenant or contract made by any person in consideration of marriage, for the future settlement on or

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(*r*) S. 41 (1). *Woolford* v. *Levy*, [1892] 1 Q. B. 772.

(*s*) That is, "taken in execution for a sum exceeding £20 in respect of a judgment"; *Ex p. Liverpool Loan Co.* (1871), 7 Ch. 732.

(*t*) *Bower* v. *Hett*, [1895] 2 Q. B. 51, 337.

(*u*) S. 41 (2). *Lole* v. *Betteridge*, [1898] 1 Q. B. 256.

(*x*) S. 40 (3).

(*y*) S. 42. See as to the course of legislation on the subject of this section, per Cave, J., in *Re Lowndes* (1886), 18 Q. B. D. 678; and Vaizey on Settlements, Ch. 21, s. 3.

(*z*) A life interest reserved to the settlor under the settlement is to be taken into account in estimating his solvency; *Re Lowndes*, *sup.*

for the settlor's wife or husband or children of any money or property wherein the settlor had not at the date of the marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property of or in right of the settlor's wife or husband, shall, on the settlor becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in the bankruptcy (*a*), except so far as it enables the persons entitled under the covenant or contract to claim for dividend in the settlor's bankruptcy in respect of the covenant or contract, but any such claim to dividend shall be postponed until all claims of the other creditors for valuable consideration in money or money's worth have been satisfied.

(3.) Any payment of money (not being payment of premiums on a policy of life assurance) or any transfer of property made by the settlor in pursuance of such a covenant or contract shall be void against the trustee in the settlor's bankruptcy, unless the persons to whom the payment or transfer was made prove either

(a) that the payment or transfer was made more than two years before the date of the commencement of the bankruptcy, *or*

(b) that at the date of the payment or transfer the settlor was able to pay all his debts without the aid of the money so paid or the property so transferred, *or*

(c) that the payment or transfer was made in pursuance of a covenant or contract to pay or transfer money or property expected to come to the settlor from or on the death of a particular person named in the covenant or contract and was made within three months after the money or property came into the possession or under the control of the settlor;

but in the event of such payment or transfer being declared void, the persons to whom it was made shall be entitled to claim for dividend in respect of the covenant or contract in like manner as if it had not been executed at the commencement of the bankruptcy.

(4.) "Settlement" shall for the purposes of this section include any conveyance or transfer of property.

The settlement is not avoided *ab initio*, but only from the date when the trustee's title accrues, and a *bona fide* purchaser for value from a donee under such a voluntary settlement has a good title against the

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(*a*) See Vaizey on Settlements, Ch. 21, s. 5; *Re Magnus*, [1910] 2 K. B. 1049; *Re Dent*, [1923] 1 Ch. 113.

trustee in bankruptcy, if he had no notice that the settlor was insolvent, though he knew that the donee claimed under a voluntary settlement (*b*). This is so even though the purchase takes place after the date to which the bankruptcy relates back if made without notice of an available act of bankruptcy (*c*).

This section does not affect the validity of antenuptial settlements, nor of any other settlement made for value. It applies only to settlements of property of the settlor himself and not to a settlement merely made in exercise of a general power of appointment (*cc*). But it includes every voluntary transfer of property where it is intended to be preserved for the benefit of any person, as distinguished from a mere gift of money intended to be spent (*d*). It should, however, be noted that trusts declared by a marriage settlement in favour of persons not within the consideration of marriage fall within the section (*e*).

This section does not apply where an insolvent estate is being administered under s. 130 (*f*).

Bonâ fide transactions without notice.

Bonâ fide transactions with the bankrupt which took place before the date of the receiving order are protected (*g*); subject to the provisions of the Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements and preferences, nothing in the Act invalidates :—

(a) Any payment by the bankrupt to any of his creditors;
(b) Any payment or delivery to the bankrupt;

(*b*) *Re Brall*, [1893] 2 Q. B. 381; *Re Carter and Kenderdine's Contract*, [1897] 1 Ch. 776; *Re Hart*, [1912] 3 K. B. 6.

(*c*) *Re Hart, sup.*

(*cc*) *Re Mathieson*, [1927] 1 Ch. 283.

(*d*) *Re Vansittart*, [1893] 1 Q. B. 181; *Re Plummer*, [1900] 2 Q. B. 790.

(*e*) *Wollaston* v. *Tribe* (1869), 9 Eq. 44. Cf. *De Mestre* v. *West*, [1891] A. C. 264; *Att.-Gen.* v. *Jacobs Smith*, [1895] 2 Q. B. 341.

(*f*) *Re Gould* (1887), 19 Q. B. D. 92; *post*, p. 411.

(*g*) S. 45. The Lands Charges Act, 1925 (ss. 2, 3, 6, 7), provides that a petition in bankruptcy may be registered as a *lis pendens*, and a receiving order in bankruptcy as an order affecting land. Purchasers of land without notice of an available act of bankruptcy are to be protected against claims by the trustee in bankruptcy in default of registration.

(c) Any conveyance or assignment by the bankrupt for valuable consideration;

(d) Any contract, dealing, or transaction by or with the bankrupt for valuable consideration,

provided that the other party to any of the transactions referred to had not at the time of such transaction notice of any available act of bankruptcy (*h*) committed by the bankrupt before that time. A transaction which comes within the terms of this section is protected although it may be an act of bankruptcy (*i*).

Second bankruptcy.

It may happen that a person who has been adjudicated bankrupt is made bankrupt a second or third time on a petition presented before he has obtained his discharge in an earlier bankruptcy, and also that an order of administration in bankruptcy may be made of the estate of a person who is an undischarged bankrupt. In these cases any property acquired by him since he was last adjudged bankrupt, which at the date when the subsequent petition was presented had not been distributed among the creditors in the last preceding bankruptcy, shall (subject to any disposition thereof made by the official receiver or trustee in that bankruptcy, without notice of the presentation of the subsequent petition, and also subject to any transactions by the bankrupt with any one dealing with him in good faith and for value (*k*)) vest in the trustee in the subsequent bankruptcy or administration, but any unsatisfied balance of the debts provable under the last preceding bankruptcy may be proved in the subsequent bankruptcy or administration by the trustee in the last preceding bankruptcy (*l*).

Disclaimer of contracts.

Before the Act of 1869 it was settled law that the mere fact of one of the parties to a contract becoming bankrupt did not of itself put an end to the contract. No doubt a man who had contracted with a bankrupt to supply goods to him was not bound to deliver them

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(*h*) Ss. 4, 167.

(*i*) *Shears* v. *Goddard*, [1896] 1 Q. B. 406.

(*k*) S. 47. *Ante*, p. 388.

(*l*) Act of 1914, s. 39, as amended by Bankruptcy (Amendment) Act, 1926, s. 3. See *Re Cullwick*, [1918] 1 K. B. 696; *Re Cohen*, [1919] 2 K. B. 271.

to him unless paid beforehand; and a man who had contracted to do work for the bankrupt was not bound to perform it unless his remuneration was secured. But, with these qualifications, the bankrupt's contracts subsisted, and the assignee was entitled to perform them (*m*), and if he performed them he got the benefit of them. But he was not bound to adopt a contract, or he might adopt it for a time, and afterwards, if he found that it was not beneficial, he might abandon it, and the other party had no remedy except his action against the bankrupt for breach of contract. Under the Act of 1914 (*n*), the trustee can disclaim shares or stocks in companies, unprofitable contracts (*o*), or other unsaleable and onerous property, within a limited time, except in cases where he has been requested by some person interested in the property to decide whether he will disclaim or not, and he has not disclaimed within twenty-eight days or such further time as may be allowed by the Court. The power of the trustee to disclaim extends to cases where an estate is being administered in bankruptcy under s. 130 (*p*).

Administration in bankruptcy of estate of deceased insolvent.

The Act of 1883 (*q*) introduced novel provisions by which creditors of a deceased debtor may obtain, on petition, an order for the administration of the estate of the deceased debtor according to the law of bankruptcy; or, if there are pending administration proceedings in any Court that Court may, on proof that the estate of the deceased is insufficient to pay his debts, transfer the proceedings to the Court exercising jurisdiction in bankruptcy, and the latter Court may then make the order for administration in bankruptcy. These provisions are now re-enacted in section 130 of the Act of 1914 (*r*).

(*m*) See *Bailey* v. *Thurston*, [1903] 1 K. B. 137.

(*n*) S. 54.

(*o*) *Re Bastable*, [1901] 2 K. B. 518.

(*p*) *Infra*. *Re Mellison*, [1906] 2 K. B. 68.

(*q*) S. 125, amended by the Act of 1890, s. 21. Now embodied in the Act of 1914, s. 130. See *Re Williams*, 36 Ch. D. 573, 583; *Re Gould* (1887), 19 Q. B. D. 92.

(*r*) This section was repealed by the Administration of Estates

This does not, however, import into the administration of the estate of a deceased insolvent all the provisions of the Act, *e.g.*, the provisions of section 40 as to executions (*s*), and of section 42 as to the avoidance of voluntary settlements, are not imported (*t*); but the provisions of section 54, enabling the trustee to disclaim onerous property, are imported (*u*).

Corporations and companies.

A receiving order cannot be made against a corporation or against a company registered under the Companies Acts (*x*).

Act, 1925, but was revived by the Expiring Laws Continuance Act, 1925.

(*s*) *Hasluck* v. *Clark*; [1899] 1 Q. B. 699; *Watkins* v. *Barnard*, [1897] 2 Q. B. 521.

(*t*) *Re Gould*, *sup.*

(*u*) *Re Mellison*, *sup.*

(*x*) Bankruptcy Act, 1914, s. 126.

CHAPTER XVIII.

STATUTES OF LIMITATION.

§ 1. *Simple contract debts—Recovery of specific chattels.*

Ch. XVIII.

At common law, apart from statute, a personal action could be maintained at any distance of time after the cause of action arose (*a*); but various periods within which rights of action must be asserted have been limited by statutes, commonly called the Statutes of Limitation.

Policy of the statutes.

The foundation of such limitations of time is, it has been observed (*b*), twofold—

> "In the first place, it is thought right that a period should be assigned beyond which actions should not be brought, on the ground of probable loss of vouchers and probable loss of evidence on the part of the persons who might be attacked by others by the act of bringing stale demands against them. The Legislature thought it right, if I may so express it, by enacting the Statute of Limitations, to presume the payment of that which had remained so long unclaimed, because the payment might have taken place, and the evidence of it might be lost by reason of the persons not pursuing their rights. But there is also another ground which may be referred to as a sound reason for imposing a limit, and requiring that parties should pursue their rights with diligence, namely, the change of position between the parties who are sought to be affected by any such stale demands."

Thus, in the case in which the observations just cited were made, a demand was set up for payment of fifty-four years' interest, amounting to a sum largely exceeding the principal money in question; it was set up after the parties against whom it was claimed had been living on the property upon which the principal was charged and spending the income of it, and applying it in various

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(*a*) Coke, 2nd Instit. 96.

(*b*) Per Ld. Hatherley in *Thomson* v. *Eastwood* (1877), 2 App. Cas. 215, 248.

ways, in ignorance or without expectation of any such demand being made against them.

We shall consider the Statutes of Limitation so far only as they relate to actions for the recovery of debts (whether on simple contract or by specialty), and for the recovery of specific personal chattels, or damages for the conversion or detention thereof (*c*).

In the case of claims relating to land, coming within the provisions of the Real Property Limitation Acts, 1833 and 1874 (*d*), the claim, if not brought within the statutory period, is extinguished. Where, however, there is a mortgage or charge on property consisting of realty and personalty, and the mortgagee's right against the realty is barred, he is not barred from enforcing his security against the personalty (*e*); and the twelve years' limitation applicable to mortgages of realty does not apply to proceedings for the redemption of a mortgage of personalty (*f*).

Statutes do not extinguish right.

The statutes under consideration, it is important to observe, merely bar the remedy and do not extinguish the debt or obligation. They do not protect the debtor unless he expressly claims their protection. It is optional to a defendant to set up the defence of the statutory bar, and if he does not set it up, the law will enforce the obligation (*g*). Where, therefore, a defendant intends to raise the defence of lapse of time, he must expressly plead the statute.

21 Jac. 1, c. 16.

The earliest Statute of Limitation as to personal

(*c*) As to debts charged on land, the period of limitation is twelve years after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless there has been some payment on account thereof or acknowledgment in writing. (Real Property Limitation Act, 1874, s. 8, substituted for s. 40 of 3 & 4 Will. 4, c. 27, under which the period of limitation was twenty years.) And see *Re Raggi*, [1913] 2 Ch. 206.

(*d*) 3 & 4 Will. 4, c. 27; 37 & 38 Vict. c. 57.

(*e*) *Re Jauncey*, [1926] Ch. 471.

(*f*) *Weld* v. *Petre*, [1929] 1 Ch. 33.

(*g*) See per Ld. Cairns, C., in *Dawkins* v. *Penrhyn* (1878), 4 App. Cas. 58, 59.

actions was passed in the reign of James I. (*h*). As to debts on simple contract and torts, it provides that—

Actions of detinue, trover, replevin, account, debt, rent—six years.

> All actions (*i*) of detinue, action sur trover, and replevin for taking away of goods and cattle; all actions of account, and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants; all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent, . . . or any of them, . . . shall be commenced and sued within the time and limitation hereafter expressed and not after, (that is to say) the said actions upon the case (*k*) (other than for slander) and the said actions for account, and the said actions for . . . debt, detinue, and replevin for goods or cattle, . . . within six years next after the cause of such actions or suit, and not after (*l*).

Debts not within this Act.

An action for arrears of rent reserved on a lease by deed (*m*), or for a rentcharge (*n*), or for debt founded on a statute (*o*), or generally, for a dividend declared by a company, being in the nature of a specialty debt (*p*), is not within the Act.

Debts within this Act.

Actions for a debt on a foreign judgment, being on the same footing as a debt by simple contract (*q*), or to recover a simple contract debt, although it may be charged on land (*r*), or money advanced on the deposit of deeds (*s*), or in respect of the liability of the equitable assignee of leaseholds to perform the covenants in the lease (*t*), or for a debt for necessaries supplied to a

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(*h*) 21 Jac. 1, c. 16, s. 3.

(*i*) A motion in bankruptcy is, for this purpose, equivalent to an action; *Re Mansell* (1892), 66 L. T. 245.

(*k*) Trover is included in these actions, though not specifically mentioned in this part of the section; *Swayn* v. *Stephens* (1631), Cro. Car. 245; 2 Wms. Saund. 121, n. (4).

(*l*) The section limits periods also in respect of actions of trespass, assault, slander, &c.

(*m*) *Freeman* v. *Stacy* (1630), Hutton, 109.

(*n*) *Stackhouse* v. *Barnston* (1805), 10 Ves. 467; see 28 R. R. 740, n.

(*o*) See *post*, p. 430.

(*p*) *Re Artisans' Corporation*, [1904] 1 Ch. 796.

(*q*) *Dupleix* v. *De Roven* (1705), 2 Vern. 540; see *Grant* v. *Easton* (1883), 13 Q. B. D., at p. 303.

(*r*) *Barnes* v. *Glenton*, [1899] 1 Q. B. 885.

(*s*) *Brocklehurst* v. *Jesson* (1835), 7 Sim. 438; 40 R. R. 172.

(*t*) *Sanderson* v. *Benson* (1841), 4 Beav. 350.

lunatic (*u*), or in respect of the liability of a banker to his customers (*x*), or upon an award of compensation under the Lands Clauses Act, 1845 (*y*), or by a creditor against an executor founded upon a *devastavit* (*z*), are within the Act.

Merchants' accounts.

At one time doubts were entertained on the meaning of the exception as to "merchants' accounts," but at length it was determined that the exception applied only to an open or current account, not to one which was stated or concluded, the object of the exception being to prevent the dividing of an account still running, where part of it falls within the six years and part before.

19 & 20 Vict. c. 97, s. 9.

The provisions of the 21 Jac. 1, c. 16, were extended to merchants' accounts by the Mercantile Law Amendment Act, 1856, which enacted (*a*)—

> All actions of account or for not accounting, and suits for such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, shall be commenced and sued within six years after the cause of such actions or suits; and no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of such action or suit.

The statutes bar remedy, but do not extinguish the right.

As we have before observed, the statutes above cited do not destroy the right, but only bar the remedy. It follows that the lien of a solicitor may be enforced after the six years (*b*); that a person having an equitable charge upon personal property to secure a simple contract debt may enforce his security after the debt is barred (*c*); that an executor or administrator does not commit a *devastavit* (*i.e.*, a misapplication of assets) by

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(*u*) *Stamford Union* v. *Bartlett*, [1899] 1 Ch. 72.

(*x*) *Foley* v. *Hill*, 2 H. L. C. 28; *Joachimson* v. *Swiss Bank Corporation*, [1921] 3 K. B. 110.

(*y*) *Turner* v. *Mid. R. Co.*, [1911] 1 K. B. 832.

(*z*) *Lacons* v. *Warmoll*, [1907] 2 K. B. 350.

(*a*) 19 & 20 Vict. c. 97, s. 9. See *Knox* v. *Gye* (1872), L. R. 5 H. L. 672.

(*b*) *Re Broomhead* (1847), 5 D. & L. 52; *Higgins* v. *Scott* (1831), 2 B. & Ad. 413; 36 R. R. 607.

(*c*) *London & Mid. Bank* v. *Mitchell*, [1899] 2 Ch. 161.

paying a debt barred by statute (*d*), though he may not pay such a debt after administration proceedings if the residuary legatee insists on the statute being set up (*e*), or if it has been judicially determined that it is barred by the statute (*f*); and that an executor may retain (*i.e.*, pay to himself as creditor) a debt barred by statute (*g*), and may set off as against a pecuniary legatee (*h*) a debt due by him to the testator which is barred by statute (*i*).

Time runs from accrual of cause of action.

The period limited by the statute begins to run from the time when the cause of action arose (*k*).

"Cause of action."

When time begins to run it does not stop.

To constitute a cause of action there must be a person capable of suing and a person capable of being sued (*l*); but the statute does not require that there should be a continuing cause of action capable of being enforced during the whole of the six years (*m*), and, if once there has been a cause of action, time will not stop running merely because during a portion of the period of six years there may be no person who can sue or no person who can be sued (*n*). Therefore where both creditor and debtor are living at the time when the cause of action arises, the statute continues to operate

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(*d*) *Norton* v. *Frecker* (1737), 1 Atk. 526; *Hill* v. *Walker* (1858), 4 K. & J. 166; otherwise, when not enforceable under the Statute of Frauds: *Re Rowson* (1885), 29 Ch. D. 358, 362. See, as to pleading the statute in administration actions, Darby & Bos. 20 *et seq.*

(*e*) *Re Wenham*, [1892] 3 Ch. 59.

(*f*) *Midgley* v. *Midgley*, [1893] 3 Ch. 282.

(*g*) *Stahlschmidt* v. *Lett* (1853), 1 Sm. & G. 415; *Hill* v. *Walker* (1858), 4 K. & J. 166; *Re Rowson*, *sup.*

(*h*) *Re Taylor*, [1894] 1 Ch. 671.

(*i*) *Re Cordwell* (1875), 20 Eq. 644; *Re Akerman*, [1891] 3 Ch. 212; see *Re Bruce*, [1908] 1 Ch. 850.

(*k*) Per Alderson, B., *Rhodes* v. *Smethurst* (1838), 4 M. & W. 63; 51 R. R. 461.

(*l*) Per Best, C.J., *Douglas* v. *Forrest* (1828), 4 Bing. 704; 29 R. R. 695; *Musurus Bey* v. *Gadban*, [1894] 2 Q. B. 352, 358. The phrase "cause of action" includes every fact which it would be necessary to prove, if traversed, in order to support the plaintiff's right to the judgment of the Court; *Read* v. *Brown* (1889), 22 Q. B. D. 128.

(*m*) Per Ld. Denman, C.J., *Rhodes* v. *Smethurst* (1840), 6 M. & W. 355; 55 R. R. 655.

(*n*) Per Ld. Abinger, C.B., *Rhodes* v. *Smethurst* (1838), 4 M. & W. 59; 51 R. R. 461.

notwithstanding the death of either creditor or debtor and the non-existence of any executor or administrator of the deceased (*o*).

Cause of action arising after death of testator or intestate.

On the other hand, where the cause of action does not arise until after the death of one of the parties, there is no complete cause of action until there is a personal representative capable of suing or being sued, as the case may be. If the deceased appointed an executor, the time of proving the will is immaterial, for an executor derives his authority from the will and not from the probate. Therefore, before probate, an executor (*p*) can sue, and, if he has acted as executor, can be sued, so that time begins to run as soon as the cause of action arises (*q*), or, in the case of an executor defendant, from the time when he could be sued as an acting executor (*r*). But an administrator derives his title solely from the grant of letters of administration by the Court, and there is no complete cause of action until such grant; from the date of which grant, therefore, the period runs within which the administrator can sue or be sued (*s*).

The statute 21 Jac. 1, c. 16 (*t*), provided that :—

Death of plaintiff or defendant, and expiration of six years.

> "If, in any of the said actions (*u*), judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff . . . ; or if any of the said actions be brought by original, and the defendant therein be outlawed, and shall reverse the outlawry, in all such cases the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit from time to

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(*o*) As to death of the creditor after the cause of action arose, see *Hickman* v. *Walker* (1669), Willes, 27; 2 Wms. Saund. 63 *k*; *Freake* v. *Cranefeldt* (1838), 3 My. & Cr. 499; as to death of the debtor, *Rhodes* v. *Smethurst* (1840), 6 M. & W. 351; 55 R. R. 655.

(*p*) *Wankford* v. *Wankford* (1700), 1 Salk. 302, 303.

(*q*) Wms. Executors (ed. 11), 218 *et seq.*, 1561; Darby & Bos. 48.

(*r*) *Rhodes* v. *Smethurst* (1838), 4 M. & W. 42; 51 R. R. 461; 6 M. & W. 351; 55 R. R. 655.

(*s*) *Murray* v. *E. I. Co.* (1821), 5 B. & Ald. 204; 24 R. R. 325; *Atkinson* v. *Bradford Bldg. Soc.* (1890), 25 Q. B. D. 377; *Chan Kit San* v. *Ho Fung Hang*, [1902] A. C. 257.

(*t*) S. 4.

(*u*) *Ante*, p. 415.

time within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after."

Upon the construction of this section it has long been decided that when an action has been commenced within the six years and the plaintiff has died during the pending of the action, his representatives may commence a new action, and in the case of the death of a defendant the plaintiff may commence a new action, within a reasonable time after probate or grant of administration, although the six years may have expired in either case (*x*). This is still the rule, although the action does not now become abated by the death of either party (*x*).

When the cause of action arises: executory agreements;

In an action on an executory promise the cause of action is the breach of the promise, not the damage (*y*). If the promise is to pay at a future time or on the happening of a contingent event or the performance of a condition, the cause of action arises at the time specified, or on the happening of the event or performance of the condition (*z*).

demand;

If the promise is to pay after notice, the cause of action does not arise until notice has been given (*a*). But if the promise is to pay on demand, the cause of action arises at once without any demand (*b*). This rule does not apply where the promise is to pay a collateral sum, *e.g.*, by a surety, on demand, in which case no cause of action arises until demand (*c*), nor does it apply to indebtedness arising out of the relationship of banker and customer, in which case no right of action arises until demand for payment has been made (*d*).

(*x*) *Swindell* v. *Bulkeley* (1887), 18 Q. B. D. 253.

(*y*) *Short* v. *M'Carthy* (1820), 3 B. & Ald. 626; 22 R. R. 503; *Gould* v. *Johnson* (1702), 2 Salk. 422; 2 Ld. Raym. 838.

(*z*) *Hammond* v. *Smith* (1864), 33 Beav. 452; *Atkinson* v. *Bradford Bldg. Soc.* (1890), 25 Q. B. D. 377.

(*a*) *Atkinson* v. *Bradford Bldg. Soc.*, *sup.*

(*b*) *Norton* v. *Ellam* (1837), 2 M. & W. 461, 464; 46 R. R. 646; *Brown* v. *Brown*, [1893] 2 Ch. 300.

(*c*) *Brown* v. *Brown*, *sup.*

(*d*) *Joachimson* v. *Swiss Bank Corporation*, [1921] 3 K. B. 110.

debts.

The cause of action for a debt arises at the time when the debt could first be recovered by action; for it is a general rule that the statute runs from the earliest time at which an action could be brought (*e*).

Goods sold on credit.

Bill or note payable at fixed time after date;

payable at sight;

after sight or on demand.

If goods are sold on credit, the cause of action arises at the time when the credit expires, not from delivery of the goods (*f*). Where a bill or note is payable at a fixed time after date, the cause of action arises at the time when it becomes due (*g*). If a bill be payable at sight, the cause of action arises on the presentment of the bill (*h*). If the bill or note is payable at a specified time after sight or demand, the cause of action arises at the expiration of that time (*i*). If it is payable on demand, the cause of action arises on the making of the bill or note, because no demand is necessary (*k*).

Contract of indemnity.

Co-sureties.

Co-trustees.

On a contract of indemnity the cause of action arises when the party to be indemnified is called upon to pay (*l*). In the case of a claim by one co-surety against the other for contribution, the cause of action arises when the claim of the principal creditor against the one for more than his proportionate share is established (*m*); so, also, in the case of a claim for contribution by one co-trustee against the other in respect of a liability incurred by their joint default (*n*).

Dividends.

When a company declares a dividend on its shares, a debt immediately becomes payable to each shareholder, and a cause of action immediately arises (*o*).

Solicitor's bill.

The cause of action on a solicitor's bill of costs arises on the completion of the work, and the statute begins to

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(*e*) Per Lindley, L.J., *Reeves* v. *Butcher*, [1891] 2 Q. B. 509, 511; *Re McHenry*, [1894] 3 Ch. 290.

(*f*) *Helps* v. *Winterbottom* (1831), 2 B. & Ad. 431; 36 R. R. 609.

(*g*) *Wittersheim* v. *Carlisle* (1791), 1 H. Bl. 631.

(*h*) *Holmes* v. *Kerrison* (1810), 2 Taunt. 323; 11 R. R. 594.

(*i*) *Thorpe* v. *Booth* (1826), 1 Ry. & M. 388.

(*k*) *Norton* v. *Ellam*, *sup.*

(*l*) *Collinge* v. *Heywood* (1839), 9 A. & E. 633; 48 R. R. 616.

(*m*) *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514.

(*n*) *Robinson* v. *Harkin*, [1896] 2 Ch. 415.

(*o*) *Re Severn & Wye Co.*, [1896] 1 Ch. 559; *Re Artisans' Corp.*, [1904] 1 Ch. 796.

run from that time, and not from the delivery of a signed bill of costs (*p*).

Husband's liability for wife's ante-nuptial debts.

In cases where the husband is liable for the wife's ante-nuptial debt, the cause of action is the wife's contract, and the statute runs, in favour of the husband, from the time when the cause of action accrued against the wife (*q*).

Where promisor disables himself from performance: or repudiates contract before time for performance.

The rule, however, that the cause of action arises upon breach of the contract is not universal, for in cases where a man undertakes to do an act on a future day, and before the day arrives disables himself from performing the act, or absolutely refuses to be bound by or perform his contract, and, so to speak, declares off the bargain himself and absolves the opposite party, it is in the option of such party at his discretion to treat that conduct as of itself a violation and breach of the contract, or to insist upon holding the repudiating party liable and sue him for non-performance when the day arrives (*r*).

Trover and conversion.

Detinue.

In an action for wrongfully depriving the plaintiff of goods (formerly and sometimes still called an action of trover or of trover and conversion (*s*)) the cause of action is the conversion, that is, some act by the defendant incompatible with a recognition on his part of the right of the plaintiff to possess (*t*), notwithstanding that the plaintiff is ignorant of such right (*u*). In an action to recover the possession of goods which came lawfully (as, for example, by a bailment) into the possession of a defendant whose possession has since become unlawful, or who has wrongfully parted with the possession (formerly called an action of detinue), the cause of action accrues at the time when the possession becomes

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(*p*) *Coburn* v. *Colledge*, [1897] 1 Q. B. 702.

(*q*) *Beck* v. *Pierce* (1889), 23 Q. B. D. 316.

(*r*) *Wilkinson* v. *Verity* (1871), L. R. 6 C. P. 209; *Hochster* v. *De la Tour*, 2 E. & B. 678.

(*s*) *Ante*, p. 22.

(*t*) *Consolidated Co.* v. *Curtis*, [1892] 1 Q. B. 495, 498.

(*u*) *Granger* v. *George* (1826), 5 B. & C. 149; 29 R. R. 196; *Imperial Gas Co.* v. *London Gas Co.* (1854), 10 Ex. 39; *Edwards* v. *Clay* (1860), 28 Beav. 145.

unlawful (*x*). Thus, where title deeds are fraudulently taken by A. from the rightful owner B., and deposited by A. with a third person C., who has no knowledge that A. has no right to them, B., the rightful owner, has no right of action against C. until the latter refuses to give up the deeds on demand being made for them; *i.e.*, until there is a claim by C. to hold them as against the owner (*y*).

Where money is deposited with a person for safe custody, and not by way of loan, a cause of action does not arise until demand for the return of the money and refusal (*z*).

Torts.

In the case of torts, if any right existing in the party damnified has been infringed, the infringement is an injury, and the law will presume that some damage resulted from it; " every injury to a right imports a damage in the nature of it, though there be no pecuniary loss " (*a*). In such cases the cause of action arises immediately, and the statute begins to run. Where, however, damage is " the gist of the action," *i.e.*, actual damage is necessary to complete the cause of action, the statute begins to run when the damage has accrued (*b*).

In the case of a tort, as in that of a contract, the general rule is that where there has once been a complete cause of action against the defendant the statute begins to run, and that subsequent circumstances which would but for the prior wrongful act or default of the defendant have constituted a cause of action against him are disregarded (*c*); but this applies only where the prior and subsequent wrongful acts are those of the same person (*d*).

(*x*) *Plant* v. *Cotterill* (1860), 5 H. & N. 430; *Clayton* v. *Le Roy*, [1911] 2 K. B. 1031.

(*y*) *Spackman* v. *Foster* (1883), 11 Q. B. D. 99; *Miller* v. *Dell*, [1891] 1 Q. B. 468; *London & Mid. Bank* v. *Mitchell*, [1899] 2 Ch. 161, 166.

(*z*) *Re Tidd*, [1893] 3 Ch. 154.

(*a*) *Ashby* v. *White* (1703), 1 Sm. L. C. (ed. 13) 253, and notes thereto.

(*b*) *Backhouse* v. *Bonomi* (1858), 9 H. L. C. 503; *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127.

(*c*) Per Willes, J., *Wilkinson* v. *Verity* (1871), L. R. 6 C. P. 209.

(*d*) *Miller* v. *Dell*, [1891] 1 Q. B. 468.

Disabilities :

We have already referred to the rule that, where a cause of action has arisen and the period of limitation has begun to run, it will continue to run notwithstanding the impossibility of bringing an action. The rule applies to cases in which, after the cause of action arises, the party who would otherwise be entitled to sue falls under disability (*e*). But, where the disability exists at the time when the right of action arises, the period of limitation does not begin to run until the removal of the disability, when for the first time there is a complete cause of action.

of plaintiffs;

Under the statute 21 Jac. 1, c. 16 (*f*), the time does not begin to run against a person entitled to sue who is, at the time the cause of action accrues, an infant, married woman, or lunatic (*g*), until the disability is removed. Under that statute time did not begin to run against a person imprisoned or beyond the seas until release or return; but these disabilities were abolished by the Mercantile Law Amendment Act, 1856 (*h*). Those provisions do not prevent the person entitled to sue from bringing his action during the period of disability, if he thinks fit to do so (*i*).

married women.

A married woman was, by the operation of this section (*k*), enabled to sue for a debt within six years after she became discovert, though the cause of action accrued more than six years before action (*l*). The probable effect of the Married Women's Property Act, 1882 (*m*), which enables a married woman to sue and be sued in all respects as if she were a *feme sole*, is to do away with the saving in her favour (*n*).

(*e*) *Homfray* v. *Scroope* (1849), 13 Q. B. 509, 512. (*f*) S. 7.

(*g*) But where the cause of action is wrongful detention as a lunatic and the sanity of the plaintiff is established, time runs against the plaintiff and he cannot rely on the section. See *Harnett* v. *Fisher*, [1927] A. C. 573 (a remarkable case).

(*h*) 19 & 20 Vict. c. 97, s. 10.

(*i*) *Strithorst* v. *Græme* (1771), 3 Wils. 145.

(*k*) 21 Jac. 1, c. 16, s. 7.

(*l*) *Scarpellini* v. *Atcheson* (1847), 7 Q. B. 864.

(*m*) 45 & 46 Vict. c. 75, s. 1 (2).

(*n*) Darby & Bos. p. 56; *Lowe* v. *Fox*, 15 Q. B. D. 667; cf. *Hulley* v. *Silversprings Bleaching Co.*, [1922] 2 Ch. 268.

Defendant "beyond the seas."

In the case of defendants, by a statute of Anne (*o*) it is enacted that if any person, against whom there is any one of the causes of action mentioned in sect. 3 of 21 Jac. 1, c. 16 (*p*), is at the time when the cause of action accrues beyond the seas, the person entitled to bring the action may do so within six years after the person liable returns from beyond the seas. No part of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part of the dominions of His Majesty, are "beyond the seas" for this purpose (*q*). These provisions are not affected by the fact that a plaintiff can now issue a writ for service upon a defendant out of the jurisdiction (*r*).

It follows that if a defendant who is beyond the seas when the cause of action arises returns to England for a very short time, and even without the plaintiff's knowledge, time begins to run against the plaintiff from the time of such return (*s*).

Joint debtors.

Formerly, if one or more of several joint debtors were beyond the seas when the cause of action arose, time did not begin to run in favour of any of them till the return or death of the absentee. But in this case it is now provided by the Mercantile Law Amendment Act, 1856 (*t*), that a plaintiff shall not be entitled to any time within which to commence an action against one joint debtor because the other is beyond the seas at the time when the cause of action accrued. The person entitled to sue can commence an action against the joint debtor who is not beyond the seas alone (*u*); and he is not barred from suing the other upon his return, although he may have recovered judgment against the joint debtor who was not beyond the seas (*t*).

(*o*) 4 Anne, c. 16, s. 19 (revised statutes, 4 & 5 Anne, c. 3).
(*p*) *Ante*, p. 415.
(*q*) 19 & 20 Vict. c. 97, s. 12.
(*r*) *Musurus Bey* v. *Gadban*, [1894] 2 Q. B. 352.
(*s*) *Gregory* v. *Hurrill* (1826), 5 B. & C. 341.
(*t*) 19 & 20 Vict. c. 97, s. 11.
(*u*) *Wilson* v. *Balcarres Co.*; [1893] 1 Q. B. 422.

Foreign ambassador.

An ambassador accredited to the sovereign cannot be sued in the Courts of this country; and this immunity extends to such a reasonable period after he has presented his letters of recall as is necessary to enable him to wind up his official business and prepare for his return to his own country; and the Statute of Limitations does not run against his creditors during the whole of such period (*x*).

Successive disabilities.

Where a person, under disability when the cause of action arises, becomes affected by a disability of another nature before the first disability ceases, time does not begin to run until the determination of the second disability (*y*).

Right of executor of person dying under disability.

If a person is under disability when the cause of action accrues to him, and so continues till his death, his personal representatives have a right of action though the period of limitation elapsed in his life.

New promise to pay—acknowledgment—part payment.

The effect of the statute 21 Jac. 1, c. 16, being to bar the remedy, not to extinguish the debt, a debtor may, by a new promise to pay, revive his liability (*z*), even after the period of limitation has expired (*a*). Such promise may be express, or implied from an acknowledgment of the debt or payment of any principal or interest. Prior to Lord Tenterden's Act, a verbal promise or acknowledgment was sufficient; but that Act, after reciting that various questions had arisen in actions founded on simple contracts as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the statute, provides that an acknowledgment or promise, to be sufficient to take a debt out of the operation of the statute, must be in writing signed by the party chargeable (*b*).

Acknowledgment to be in writing.

(*x*) *Musurus Bey* v. *Gadban*, *sup.*

(*y*) See *Musurus Bey* v. *Gadban*, *sup.*; Darby & Bos. 61.

(*z*) See per Ld. Tenterden, C.J., in *Tanner* v. *Smart* (1827), 6 B. & C. 606; 30 R. R. 461.

(*a*) *Re Lane* (1889), 23 Q. B. D. 74.

(*b*) 9 Geo. 4, c. 14, s. 1. See *Re Hollingshead* (1888), 37 Ch. D. 657.

Acknowledgment by joint debtor;

It further provides that a written acknowledgment by one of several joint contractors, or executors or administrators of a contractor, shall not deprive the others of the benefit of the statutes (*b*); and that a plaintiff may recover against those of them who have given an acknowledgment or promise (*b*).

by co-executor.

With regard to co-executors of a contractor, it has been decided that the effect of this section is only to prevent the one from being made personally liable by an acknowledgment given by the other; and that an acknowledgment by one only, given in his character of executor only, will bind the testator's personal estate (*c*).

The effect of any payment of principal or interest made by any person is, however, preserved (*d*).

Signature by agent.

By the Mercantile Law Amendment Act, 1856, a written acknowledgment, signed by a duly authorised agent, is made sufficient (*e*).

Payment by a joint debtor.

By the last-mentioned Act, it is provided that payment of any principal or interest by one of several co-debtors, co-contractors, or executors or administrators of a contractor, shall not of itself deprive the others of the benefit of the statutes (*f*). If, however, the payment is made by one co-debtor under such circumstances that the payment was made by him as agent for, or at the request of, another co-debtor, the liability of the latter will be kept alive (*g*).

The effect of Lord Tenterden's Act (*h*), which did not make any alteration in the legal construction to be put upon promises or acknowledgments, but merely required

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(*b*) See note (*b*), *ante*.

(*c*) *Re Macdonald*, [1897] 2 Ch. 181.

(*d*) 9 Geo. 4, c. 14, s. 1. See *Re Hollingshead* (1888), 37 Ch. D. 657.

(*e*) 19 & 20 Vict. c. 97, s. 13.

(*f*) S. 14. See *Watson* v. *Woodman* (1875), 20 Eq. 721.

(*g*) *Tucker* v. *Tucker*, [1894] 3 Ch. 429.

(*h*) 9 Geo. 4, c. 14, s. 1. See, on this Act, the notes to *Whitcomb* v. *Whiting* (1781), 1 Sm. L. C. (ed. 13) 634.

a different mode of proof (*i*), was thus stated by Mellish, L.J. (*k*) :—

There must be— (1) express promise, or (2) acknowledgment from which promise can be inferred.

> "There must be a proof of some writing signed by himself, either containing an express promise to pay the debt, or being in terms from which an unconditional promise to pay it is necessarily to be implied. If, therefore, the writer, although he admits the existence of a debt, refuses to pay it or reserves the matter for future consideration, or refers the creditor to some third person for payment, or the like, this will not be sufficient to prevent the operation of the statute. That being the rule, there must be one of these three things to take the case out of the statute. Either there must be an acknowledgment of the debt, from which a promise to pay is to be implied; or, secondly, there must be an unconditional promise to pay the debt; or, thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed."

To whom it must be made.

An absolute acknowledgment of the debt is sufficient, because an unconditional promise to pay may be inferred from it (*l*). The acknowledgment therefore "must be to the creditor (*m*) or his agent, to someone who was entitled to receive payment of the debt, and to whom you could presume a promise to pay it" (*n*).

Acknowledgment by payment.

A part payment of principal, or a payment of interest, may also take a case out of the operation of the statute, if from such payment an acknowledgment and a promise to pay the residue can be inferred (*o*). This, as has been already pointed out, is excepted from the provisions of sect. 1 of Lord Tenterden's Act.

(*i*) Per Tindal, C.J., in *Haydon* v. *Williams* (1830), 7 Bing. 166; 33 R. R. 415.

(*k*) *Re River Steamship Co.* (1871), 6 Ch. 828. See *Banner* v. *Berridge* (1881), 18 Ch. D. 273; *Langrish* v. *Watts*, [1903] 1 K. B. 636. The cases as to promise or acknowledgment are collected in Darby & Bos. pp. 69-91.

(*l*) *Tanner* v. *Smart* (1827), 6 B. & C. 603; 30 R. R. 461; *Cooper* v. *Kendall*, [1909] 1 K. B. 405; *Brown* v. *Mackenzie* (1913), 29 T. L. R. 310; *Fettes* v. *Robertson* (1921), 37 T. L. R. 581; *Spencer* v. *Hemmerde*, [1922] 2 A. C. 507. Notes to *Whitcomb* v. *Whiting* (1781), 1 Sm. L. C. 634.

(*m*) *Fuller* v. *Redman* (1859), 26 Beav. 619; *Moodie* v. *Bannister* (1859), 4 Drew. 439.

(*n*) Per Ld. Herschell, *Stamford Bank* v. *Smith*, [1892] 1 Q. B. 769; *Re Beavan*, [1912] 1 Ch. 196.

(*o*) *Tanner* v. *Smart*, *sup.*; *Re Lee*, [1920] 2 K. B. 200. Notes to *Whitcomb* v. *Whiting*, *sup.*

Parke, B., explains this as follows (p) :—

> "In order to take a case out of the Statute of Limitations by a part payment, it must appear, in the first place, that the payment was made on account of a debt (q); secondly, it must appear that the payment was made on account of *the* debt for which the action is brought. But the case must go farther, for it is necessary, in the third place, to show that the payment was made as part payment of a greater debt, because the principle upon which a part payment takes the case out of the statute is that it admits a greater debt to be due at the time of payment. Unless it amounts to an admission that more is due, it cannot operate as an admission of any still existing debt."

Payment to or by agents.

The payment must be made to the creditor or to an agent of the creditor (r), and for this purpose the *cestui que trust* is agent for the trustee (s); it may be made by the agent of the debtor (t); and a payment by the debtor to a third person may be sufficient if made at the creditor's request, express or implied, in part payment of the debt (u).

What is a payment.

The payment need not actually be made in money (x); acceptance of goods in part payment or any arrangement which has the effect of partially discharging the debtor is sufficient (y).

If the payment was made by a cheque or bill of exchange, the new promise to pay is considered to have been made when the bill or cheque was given, and not when it was paid (z).

(p) *Tippets* v. *Heane* (1834), 1 C. M. & R. 253; 40 R. R. 549.

(q) This may be implied from circumstances; *Burn* v. *Boulton* (1846), 2 C. B. 476; *Evans* v. *Davies* (1836), 4 A. & E. 840. The payment must have been made *on account* and not as payment in full; *Burn* v. *Boulton*, *sup.*

(r) *Evans* v. *Davies* (1836), 4 A. & E. 840; *Hart* v. *Stephens* (1845), 6 Q. B. 937; *Stamford Bank* v. *Smith*, [1892] 1 Q. B. 765.

(s) *Megginson* v. *Harper* (1834), 2 Cr. & M. 322; 39 R. R. 784.

(t) *Jones* v. *Hughes* (1850), 5 Ex. 104; *Newbould* v. *Smith* (1886), 33 Ch. D. 127; *Thorne* v. *Heard*, [1895] A. C. 495.

(u) *Worthington* v. *Grimsditch* (1845), 7 Q. B. 479.

(x) See *Re Dixon*, [1900] 2 Ch. 561.

(y) As to acceptance of goods, *Hooper* v. *Stephens* (1835), 4 A. & E. 71; 43 R. R. 306; *Hart* v. *Nash* (1835), 2 C. M. & R. 337; 41 R. R. 732. As to other instances, see *Moore* v. *Strong* (1835), 1 Bing. N. C. 441; *Maber* v. *Maber* (1867), L. R. 2 Ex. 153.

(z) *Marreco* v. *Richardson*, [1908] 2 K. B. 584.

Appropriation of payments.

Where there are two or more debts owing by the debtor to the same creditor and some are barred by the statute and some not, the creditor can appropriate to the barred debts a general payment, not appropriated by the debtor, yet such payment will not revive the barred debts (*a*). But the appropriation by the creditor of a general payment to the debt which is not statute barred will take that debt out of the statute (*b*). The law as to the appropriation of any payment to a particular debt or item is that the debtor may, in the first instance, appropriate (*c*) the payment—*solvitur in modo solventis*; if he omits to do so, the creditor may make the appropriation—*recipitur in modo recipientis*; but if neither make any appropriation, the law appropriates the payment to the debt which is not barred (*d*).

Where there has been an acknowledgment, or part payment, or payment of interest, the statute begins to run from the last acknowledgment or payment.

§ 2. *Specialty Debts—Penalties—Judgment Debts—Legacies—Personal Estate of Intestates.*

Specialty debts—20 years.

It was enacted by the Civil Procedure Act, 1833 (*e*), that actions for debt for rent upon an indenture of demise, and actions of covenant or debt upon any bond or other specialty, must be commenced within twenty years after the cause of action; or, in the case of a person who is under disability (*i.e.*, an infant, a married woman (*f*), or a person *non compos mentis*) at the time when the cause of action accrues, within twenty years

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(*a*) *Mills* v. *Fowkes* (1839), 5 Bing. N. C. 455; 50 R. R. 750.

(*b*) *Nash* v. *Hodgson* (1855), 6 De G. M. & G. 474.

(*c*) This may be proved by his declarations either before or after payment or by other circumstances: *Waters* v. *Tompkins* (1835), 2 C. M. & R. 723; 41 R. R. 827; *Walker* v. *Butler* (1856), 6 E. & B. 506; *Cleave* v. *Jones* (1851), 6 Ex. 573.

(*d*) See *Clayton's Case* (1816), 1 Mer. 585; 15 R. R. 161; and Tudor's L. C., Merc. Law, 1. See *Friend* v. *Young*, [1897] 2 Ch. 421; *Smith* v. *Betty*, [1903] 2 K. B. 317.

(*e*) 3 & 4 Will. 4, c. 42, s. 3.

(*f*) As to the effect of the provisions of the Married Women's Property Act, 1882, *ante*, p. 423.

from such disability ceasing (*g*). Being in prison was not a disability under this statute, and the disability mentioned in it of being beyond the seas was abolished by the Mercantile Law Amendment Act (*h*). The result is that at the present day the rules as to disabilities are the same in the case of specialty as in that of simple contract debts (*i*).

Statutory liability to pay money.

A statutory liability to pay money is a specialty debt within the meaning of the Act of 1833, as, for example, the liability to pay calls incurred by a member of a company under the Companies Clauses Act, 1845 (*k*); and the liability of a company to pay interest upon debentures under sect. 27 of the Companies Clauses Act, 1863 (*l*). Moneys payable by a member of a company under the Companies Act, 1929, to the company, or on the winding-up of the company, are specialty debts, independently of the general law, by the express provisions of that Act (*m*).

Statutory penalties.

Actions for penalties, or sums of money in the nature of penalties, given to the party grieved, by any statute, must be brought within two years after the cause of action arises (*n*).

When cause of action arises.

The instant from which time begins to run under the statute is that at which the "cause of action" arises. Thus, in the case of a covenant, time begins to run from breach of the covenant (*o*); and where there are successive breaches, a fresh cause of action arises on each breach, so that the statute may bar the remedy on the earlier though not on the later breaches (*p*); and where the breach is continuous, a fresh cause of action

Continuing breaches.

(*g*) 3 & 4 Will. 4, c. 42, s. 4.

(*h*) 19 & 20 Vict. c. 97, s. 10.

(*i*) See *ante*, p. 423, as to disabilities.

(*k*) 8 & 9 Vict. c. 16.

(*l*) 26 & 27 Vict. c. 118. *Re Cornwall Minerals Rail. Co.*, [1897] 2 Ch. 74.

(*m*) Ss. 20 (2), 159.

(*n*) 3 & 4 Will. 4, c. 42, s. 3. See *Thomson* v. *Lord Clanmorris*, [1900] 1 Ch. 718.

(*o*) *Tuckney* v. *Hawkins* (1847), 4 C. B. 655.

(*p*) *Amott* v. *Holden* (1852), 18 Q. B. 593.

continuously arises so long as the breach continues (*q*). Thus a covenant for title is continuously broken so long as an adverse title exists in another person (*r*).

Acknowledgment or part payment.

If there has been any acknowledgment by writing signed by the party liable (*s*) or his agent, or by payment on account of principal or interest, the person entitled may sue within twenty years after such acknowledgment; or, if the person entitled is under disability at the time of such acknowledgment, or the party making such acknowledgment is at the time beyond the seas, the person entitled may sue within twenty years after the ceasing of the disability or the return of the party from beyond the seas (*t*).

Acknowledgment.

An acknowledgment under this section is different in its nature from an acknowledgment sufficient under the Statute of James I. In the latter case the acknowledgment operates, as we have seen (*u*), as a new promise to pay, of the same nature as the original contract; in the former case it has no such effect, for a promise not by specialty cannot operate as a renewal of a contract by specialty, but the acknowledgment merely operates so as to give further time during which the action on the specialty may be brought. It follows that it is not necessary that the acknowledgment should be made to the person entitled to payment or to his agent (*x*).

Real Property Limitation Act, 1874.

The Real Property Limitation Act, 1874 (*y*), provides that proceedings to recover any money secured by a "mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy," must be brought within twelve years next after a present right to receive the same (*z*) has accrued to some person capable of giving a discharge or

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(*q*) *Maddock* v. *Mallet* (1860), 12 Ir. C. L. R. 173, 192.
(*r*) *Spoor* v. *Green* (1874), L. R. 9 Ex. 99, 117.
(*s*) *Read* v. *Price*, [1909] 2 K. B. 724.
(*t*) 3 & 4 Will. 4, c. 42, s. 5.
(*u*) *Ante*, p. 425.
(*x*) *Moodie* v. *Bannister* (1859), 4 Drew. 432.
(*y*) 37 & 38 Vict. c. 57, s. 8.
(*z*) *Hornsey* v. *Monarch Soc.* (1890), 24 Q. B. D. 1; *Re Owen*, [1894] 3 Ch. 220; *Re Witham*, [1922] 2 Ch. 413.

release for the same; "unless in the meantime (*a*) some part of the principal money, or some interest thereon, shall have been paid" or some acknowledgment in writing shall have been given, in which case the action must be brought within twelve years after the last payment or acknowledgment.

Effect on personal covenant.

The effect of this Act is to bar the personal remedy upon the covenant in a mortgage deed, or upon a collateral bond of the mortgagor, or upon the covenant to pay a rentcharge, as well as the remedy against the land, and in such cases to cut down to twelve years the period allowed by sect. 3 of the Act of 1833; but it does not enlarge the period of six years within which an action to recover (*b*) a simple contract debt must be brought even if the debt is also charged upon land (*c*).

Surety.

The liability of a surety who has entered into a joint covenant with the mortgagor is within this Act; and payment of interest by the mortgagor prevents the statute running in favour of the surety (*d*). The provisions of sect. 14 (*e*) of the Mercantile Law Amendment Act, 1856, do not apply to this Act (*d*).

Joint debtors.

Collateral bond by surety.

A collateral bond given by a surety is not, however, within this Act, and the period of limitation is twenty years under the Act of 1833 (*f*).

Payment, by whom.

The payment of principal or interest must be made by a person who is bound to pay, either as between himself and the person entitled to receive payment or as between himself and the person liable to pay (*g*). Payment of interest by an assignee (*h*) or tenant for life (*i*) of the equity of redemption, where there is a

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(*a*) *Re Clifden*, [1900] 1 Ch. 774.

(*b*) *Sutton* v. *Sutton* (1883), 22 Ch. D. 511; *Fearnside* v. *Flint* (1883), 22 Ch. D. 579; *Shaw* v. *Crompton*, [1910] 2 K. B. 370. *Ante*, p. 415.

(*c*) *Barnes* v. *Glenton*, [1899] 1 Q. B. 885.

(*d*) *Re Frisby* (1890), 43 Ch. D. 106.

(*e*) *Ante*, p. 426.

(*f*) *Re Powers* (1885), 30 Ch. D. 291.

(*g*) *Re Clifden*, [1900] 1 Ch. 774; *Bradshaw* v. *Widdrington*, [1902] 2 Ch. 430.

(*h*) *Forsyth* v. *Bristowe* (1853), 8 Ex. 722.

(*i*) *Dibb* v. *Walker*, [1893] 2 Ch. 429.

mortgage, is sufficient to prevent the remedy upon the covenant being barred.

Judgments.

The "judgment" mentioned in this Act is not restricted to judgments which operate as charges upon land, but refers to judgments generally (*k*).

Lien on personal chattels.

It would appear that no Statute of Limitation is applicable to a lien or charge, *e.g.*, a vendor's lien, on personal chattels (*l*).

Legacies.

An action to recover a legacy, payable out of personal estate, from an executor is within this enactment (*m*), unless the legacy is vested in the executor upon an express trust (*n*); a mere constructive trust will not prevent the statute from being a bar (*n*). By the Real Property Limitation Act, 1833, no arrears of interest in respect of a legacy can be recovered after six years or an acknowledgment in writing (*o*); but arrears of an annuity, bequeathed payable out of personal estate are not arrears of "interest" in respect of a legacy (*p*).

Personal estate of intestate.

An action to recover the personal estate, or a share thereof, of an intestate, possessed by the personal representative, must be brought within twenty years after a present right to receive the same has accrued to a person capable of giving a discharge or release for the same (*q*), or after some part of the estate or share, or interest in respect thereof, has been accounted for or paid, or a written acknowledgment has been given (*r*). A claim in respect of assets not received by the personal representative until within twenty years before action is not barred, though the claim in respect of all assets

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(*k*) *Jay* v. *Johnstone*, [1893] 1 Q. B. 189; *Hebblethwaite* v. *Peever*, [1892] 1 Q. B. 124.

(*l*) *Davies* v. *Thomas*, [1900] 2 Ch. 462; *Re Stucley*, [1906] 1 Ch. 67.

(*m*) 37 & 38 Vict. c. 57, s. 8.

(*n*) *Evans* v. *Moore*, [1891] 3 Ch. 119; *Re Barker*, [1892] 2 Ch. 491; *Re Mackay*, [1906] 1 Ch. 25.

(*o*) 3 & 4 Will. 4, c. 27, s. 42.

(*p*) *Re Ashwell* (1859), Joh. 112. See *Re Bannerman* (1882), 21 Ch. D. 105.

(*q*) *Re Pardoe*, [1906] 1 Ch. 265; 2 *id.* 340.

(*r*) 23 & 24 Vict. c. 38, s. 13.

received by him before that time is barred (*s*); and part payment out of assets received within twenty years will not operate as an acknowledgment of the right to assets received more than twenty years before (*t*).

Acknowledgment in writing.

The acknowledgment in writing in the cases within the Real Property Limitation Act, 1874 (*u*), and the Law of Property Amendment Act, 1860 (*x*), must be signed by the person liable or his agent, and must be given to the person entitled or his agent.

Statutes of Limitation do not bind the Crown; consequently a claim by a Government Department, although incorporated, as agents for the Crown, is not barred, although the statutory period has elapsed (*y*).

§ 3. *Actions in Equity.*

The Acts of 21 Jac. 1, c. 16, and 3 & 4 Will. 4, c. 42, did not in terms apply to suits in equity; but these statutes

Equity follows the law where claim is founded on legal rights.

> "must be taken virtually to include Courts of Equity; for when the legislature by statute limited the proceedings at law in certain cases, and provided no express limitations for proceedings in Equity, it must be taken to have contemplated that Equity followed the law: and therefore it must be taken to have virtually enacted in the same cases a limitation for Courts of Equity also" (*z*).

It follows that where there is both an equitable and a legal remedy, Courts exercising equitable jurisdiction are bound to the exact periods named in the statutes (*a*)

(*s*) *Sly* v. *Blake* (1885), 29 Ch. D. 964.

(*t*) *Id.*

(*u*) 37 & 38 Vict. c. 57, s. 8.

(*x*) 23 & 24 Vict. c. 38, s. 13.

(*y*) *Commrs. of H. M. Works, &c.* v. *Pontypridd Masonic Hall Co.*, [1920] 2 K. B. 233. The question whether the Crown can claim the benefit of Statutes of Limitation was raised in *Board of Trade* v. *Cayser, Irvine & Co.*, [1927] A. C. 610, but was left open.

(*z*) Per Lord Redesdale, *Hovenden* v. *Annesley* (1806), 2 Sch. & Lef. 631; 9 R. R. 119. See per Ld. Coleridge, C.J., *Gibbs* v. *Guild* (1882), 9 Q. B. D. 64; per Jessel, M.R., *Re Greaves* (1881), 18 Ch. D. 551; *Re Hastings* (1887), 35 Ch. D. 94; *Knox* v. *Gye* (1872), L. R. 5 H. L. 656; *Bulli Co.* v. *Osborne*, [1899] A. C. 351; *Re Robinson*, [1911] 1 Ch. 502.

(*a*) See per Jessel, M.R., *Re Greaves*, *sup.*

and to give effect to all the exceptions in the statutes as to disabilities, part payment and acknowledgments (*b*).

Otherwise where claim purely equitable.

On the other hand, where the claim is not founded on a legal right, but is purely equitable and the remedy is equitable only, the Court is not in any sense bound by the provisions of the statutes. Thus, as a general rule, time does not run between trustee and *cestui que trust* where the trust is express (*c*), *i.e.*, a trust which has been expressed by writing or word of mouth (*d*), or has arisen because a person has assumed to act as trustee (*e*), or which the parties intended to create (*f*), as distinguished from a resulting, implied, or constructive trust, *i.e.*, one arising from the acts of the parties or by operation of law (*g*).

Debts of married woman in respect of separate estate.

Before the Married Women's Property Act, 1882, when a married woman had contracted in respect of her separate estate, the proceedings in Equity to obtain payment out of her separate estate were held to be barred by analogy to the Statute of Limitations (*h*).

Agent in fiduciary capacity.

Where an agent is sued on the ground of his being in a fiduciary capacity, the statute has no application unless the claim be for an account (*i*); and where the duty of persons is to receive property and hold it for another, or to keep it until it is called for, or to use it for a particular purpose, they cannot discharge themselves from that trust by appealing to the lapse of time (*k*).

(*b*) *White* v. *Ewer* (1670), 2 Vent. 340.

(*c*) The then existing law was re-enacted by the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (2).

(*d*) *Burdick* v. *Garrick* (1870), 5 Ch. 233; *Re Bell* (1887), 34 Ch. D. 462.

(*e*) *Soar* v. *Ashwell*, [1893] 2 Q. B. 390; *Re Eyre-Williams*, [1923] 2 Ch. 533.

(*f*) *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, 208.

(*g*) Per Grant, M.R., *Beckford* v. *Wade* (1805), 17 Ves. 97; 11 R. R. 20; *Patrick* v. *Simpson* (1890), 24 Q. B. D. 128.

(*h*) *Hallett* v. *Hastings* (1887), 35 Ch. D. 94.

(*i*) *Friend* v. *Young*, [1897] 2 Ch. 421, 430; *North American Co.* v. *Watkins*, [1904] 1 Ch. 242; 2 *id.* 233.

(*k*) *Burdick* v. *Garrick* (1870), 5 Ch. 240, 243, per Ld. Hatherley, C., and Giffard, L.J.; *Banner* v. *Berridge* (1881), 18 Ch. D. 264; *Lyell* v. *Kennedy* (1889), 14 App. Cas. 437, 454, 457, 463; and per Lindley, L.J., *Re Sharpe*, [1892] 1 Ch. 166; *Soar* v. *Ashwell*, [1893] 2 Q. B. 390; *North American Co.* v. *Watkins*, *sup.*

Trustee Act, 1888.

The law as to trustees has been partially altered by the Trustee Act, 1888 (*l*), which by sect. 8 provides that :—

> 1. In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy (*m*), or is to recover trust property or the proceeds thereof still retained (*m*) by the trustee, or previously received by the trustee and converted to his use (*n*), the following provisions shall apply—
>
> (a) All rights and privileges conferred by any Statute of Limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him.
>
> (b) If the action or other proceeding is brought to recover money or other property, and is one to which no existing Statute of Limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.
>
> 2. No beneficiary as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded.
>
> 3. This section shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing Statute of Limitations.

"Trustee" in this Act includes an executor or administrator and a trustee whose trust arises by con-

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(*l*) 51 & 52 Vict. c. 59.

(*m*) *Thorne* v. *Heard*, [1895] A. C. 495.

(*n*) *Re Gurney*, [1893] 1 Ch. 590; *Re Timmis*, [1902] 1 Ch. 176.

struction or implication of law, as well as an express trustee (*o*).

An action by a newly appointed trustee against a former trustee to compel him to make good losses arising from improper investments made more than six years before action (*p*); an action by a person entitled to a share of residuary personal estate against the trustees of the will for breach of trust whereby the residue was diminished, brought more than six years after his interest had fallen into possession (*q*); an action by a person entitled to residuary personal estate, brought more than six years after he came of age, against the trustees for administration, where the whole estate had been expended on the infant during his minority (*r*); and an action by *cestui que trust* against trustees to compel them to make good the loss arising from breach of trust in investing upon insufficient security (*s*), or neglecting to invest (*t*), are barred by the above provisions.

Directors of a company are trustees in respect of moneys of the company which have come to their hands, or are under their control, and can claim the protection of the above Act in proceedings against them for misapplication of such moneys (*u*).

Claim of *cestui que trust* when trustee barred.

Where a chose in action is vested in trustees on trusts and their right to sue at law is barred by statute, if the *cestuis que trust* are merely entitled to the benefit of an action by the trustees, their remedy is barred also; but, if they have an independent remedy in equity against the debtor, the question whether the statutes apply depends upon whether the remedy of the *cestuis que trust* against the debtor is analogous to a legal remedy. If it is, the statutes apply; otherwise they do not apply.

(*o*) S. 1 (3). See *Re Blow* (1913), 30 T. L. R. 117.
(*p*) *Re Bowden* (1890), 45 Ch. D. 444.
(*q*) *Re Swain*, [1891] 3 Ch. 233.
(*r*) *Re Page*, [1893] 1 Ch. 304.
(*s*) *Re Somerset*, [1894] 1 Ch. 231.
(*t*) *Re Fountaine*, [1909] 2 Ch. 382.
(*u*) *Re Lands Allotment Co.*, [1894] 1 Ch. 616; *Re Sharpe*, [1892] 1 Ch. 154.

The only case in which the beneficiaries have such an independent remedy is where the debtor is a party to the trust, or is privy to a breach of trust; as, for example, where a settlor covenants to pay money to trustees for the purposes of the settlement (*x*), or where trust moneys are improperly advanced to a person who knows that his taking them is a breach of trust (*y*), or where the debtor knows that the debt is trust property and deals with it in such a manner as to prevent the *cestuis que trust* from receiving it (*z*).

Fraud.

In cases of fraud, if no limitation of time is prescribed by statute, " a Court of Equity will never lay down as a general proposition, that though the fact that imposition has been practised be established, the party is too late. The true operation of length of time is by way of evidence " (*a*).

If the case falls within the statute, time will not begin to run against a person seeking to upset the transaction in equity on the ground of fraud or undue influence, until he discovers, or might with reasonable care have discovered, the fraud (*b*), or is freed from the influence (*c*). In the case of partners, however, the one is entitled to rely on the good faith of the other, and concealed fraud by the one will prevent the operation of the statute although the other might have discovered it if he had used due caution (*d*).

If, however, the claim is one which is purely a claim for damages at common law, the statute will run from

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(*x*) *Burrowes* v. *Gore* (1858), 6 H. L. C. 907.

(*y*) *Ernest* v. *Croysdill* (1860), 2 De G. F. & J. 175.

(*z*) Per Ld. Wensleydale, 6 H. L. C. 967.

(*a*) *Morse* v. *Royal* (1806), 12 Ves. 374; 8 R. R. 338; *Aylward* v. *Kearney* (1814), 2 Ball & B. 463.

(*b*) *Blair* v. *Bromley* (1847), 5 Ha. 542; 2 Ph. 354; *Browne* v. *McClintock* (1873), L. R. 6 H. L. 456; *Gibbs* v. *Guild* (1882), 9 Q. B. D. 59; *Oelkers* v. *Ellis*, [1914] 2 K. B. 139. As to the effect of the Trustee Act, 1888, see *Moore* v. *Knight*, [1891] 1 Ch. 547.

(*c*) *Aylward* v. *Kearney*, *sup.*; *Wright* v. *Vanderplank* (1855), 2 K. & J. 1; *Clanricarde* v. *Henning* (1861), 30 Beav. 175.

(*d*) *Betjemann* v. *Betjemann*, [1895] 2 Ch. 474.

the time the cause of action arose, in spite of fraudulent concealment of facts by the defendants (*e*).

Where fraud is alleged in order to take the case out of the Statutes of Limitation, it is not sufficient to prove that the wrongful act was unknown to the injured person, or to show that property has been wrongfully enjoyed while the true owner is ignorant of his rights (*f*); there must be abuse of a confidential position (*g*), or active fraud (*h*); and the fraud must be that of, or in some way imputable to, the person who invokes the aid of the statute (*i*).

Laches, or stale demands in equity.

Lapse of time is always considered of importance in equity, and relief may be refused on the ground of laches, either in cases of fraud where the time prescribed by the statute has not elapsed since the discovery of the fraud (*k*), or where the statutes do not apply (*l*). For, if a person having knowledge of his rights sits still and permits other persons to acquire interests and consider themselves as owners of the property, every presumption will be made against him (*m*). And staleness of demand, as distinguished from the Statute of Limitation and analogy to it, may furnish a defence in equity to an equitable demand (*n*).

"Even where there is an express trust, lapse of time, coupled with other circumstances which render it unjust to give the plaintiff relief against the defendant, will induce the Court to refuse the relief, although no Statute of Limitations might bar his claim" (*o*).

(*e*) *Osgood* v. *Sunderland* (1913), 30 T. L. R. 530.

(*f*) *Dean* v. *Thwaite* (1855), 21 Beav. 621.

(*g*) *Rolfe* v. *Gregory* (1865), 34 L. J. Ch. 274; *Gresley* v. *Mousley* (1858), 1 Giff. 450.

(*h*) *Bulli Coal Mining Co.* v. *Osborne*, [1899] A. C. 351.

(*i*) *Thorne* v. *Heard*, [1895] A. C. 495; *Re McCallum*, [1901] 1 Ch. 143.

(*k*) *Sibbering* v. *Balcarras* (1850), 3 De G. & Sm. 735.

(*l*) *Thomson* v. *Eastwood* (1877), 2 App. Cas. 215.

(*m*) Per Arden, M.R., *Pickering* v. *Stamford* (1793), 2 Ves. jun. 280; *Erlanger* v. *New Sombrero Co.* (1878), 3 App. Cas. 1218, 1279; *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, 210.

(*n*) Per Lindley, L.J., *Re Sharpe*, [1892] 1 Ch. 168; *Brooks* v. *Muckleston*, [1909] 2 Ch. 519.

(*o*) *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, 212.

Trust moneys lent to tenant for life.

It should be observed that, in the common case of trust moneys being improperly advanced to a tenant for life, being the person who ought to receive the income arising from them, time cannot run in his favour during his lifetime (*p*), for the transaction amounts to constructive payment of interest by him.

Trust for payment of debts.

The next question for consideration is how far the creation of a trust for payment of debts affects the operation of the statutes as regards existing debts. A trust created by will for payment of the testator's debts out of his real estate does not revive a debt barred by statute in the testator's lifetime (*q*); and, according to the maxim "expressio eorum quae tacite insunt nihil operatur" (*r*), a trust created by will for payment of the testator's debts out of his personal estate does not exclude the operation of the statute, for the executors are by law trustees for the creditors and the will does not alter their legal liability (*s*).

Effect of administration action.

Judgment in an action for administration on behalf of creditors generally, would seem to stop the operation of the statute; but the mere commencement or pendency of the action has not this effect (*t*).

(*p*) *Mills* v. *Borthwick* (1865), 11 Jur. (N.S.) 558; 13 W. R. 707.

(*q*) *Burke* v. *Jones* (1813), 2 V. & B. 275; 13 R. R. 83; *O'Connor* v. *Haslam* (1855), 5 H. L. C. 178.

(*r*) Elph. N. & C. Interp. 85.

(*s*) *Scott* v. *Jones* (1838), 4 Cl. & F. 382; 42 R. R. 29.

(*t*) *Re Greaves* (1881), 18 Ch. D. 551, per Jessel, M.R., explaining *Sterndale* v. *Hankinson* (1827), 1 Sim. 393; 27 R. R. 210.

CHAPTER XIX.

DEVOLUTION OF PROPERTY ON DEATH.

Will, power of making.

The power of making a will or testament of personal property seems to have existed from a very early time (*a*). In the city of London, the province of York, and the principality of Wales, there were formerly customs which restricted the testamentary power of a man who left a wife or children; but these customs have long since been abolished by statute (*b*).

Nuncupative will.

At common law a will might be "nuncupative," *i.e.*, by word of mouth without writing; but by the Statute of Frauds (*c*) nuncupative wills of personal property exceeding in value £30, though not absolutely abolished, were subjected to such restrictions and requirements that they fell into disuse.

Statute of Frauds.

The Statute of Frauds (*d*) required wills of lands to be in writing signed by the devisor or by some other person in his presence and by his express directions, and to be attested and subscribed in the presence of the devisor by three or four credible witnesses; but it did not require wills of personalty to be signed or attested at all (*e*); and so the law remained until the year 1837, when the Wills Act (*f*) provided that a will (which is defined so as to include a codicil (*g*)) "shall be signed at the foot or

Wills Act, 1837. Requirements;

(*a*) See 2 Bl. 491 *et seq.*; Jenks, Short History of English Law, p. 62; Holdsworth, History of English Law, Vol. II., p. 95.

(*b*) As to freemen of the city of London by 11 Geo. 1, c. 18, s. 17; as to York, 4 & 5 W. & M. c. 2; 2 & 3 Anne, c. 5; as to Wales, 7 & 8 Will. 3, c. 38. See the question whether the custom ever prevailed over all England discussed in Williams, Executors, 2. And as to the custom of London, see Com. Dig. *Guardian* (G. 2); 2 Salk. 426; *Hall* v. *Hall* (1692), 2 Vern. 277, 612, 685; Kenny on Marr. Women, 66.

(*c*) 29 Car. 2, c. 3, s. 19. See 4 Anne, c. 16, s. 14.

(*d*) 29 Car. 2, c. 3, s. 5.

(*e*) See cases cited in *Limbery* v. *Mason*, Com. Rep. 451.

(*f*) 7 Will. 4 & 1 Vict. c. 26, s. 9.

(*g*) *Ib.* s. 1.

signature; two witnesses.

end thereof by the testator or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator" (*h*).

"Foot or end."

The Wills Act Amendment Act, 1852 (*i*), in order to explain what is meant by signature "at the foot or end thereof" provides that the signature is sufficient if it is "so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will" (*k*); the Act goes on to enumerate many cases of such signatures which are to be sufficient (*l*). No signature, however, shall give effect to anything which follows after it or is inserted after the signature is made (*l*).

Subscription by witnesses.

The attesting witnesses must "subscribe" the will, but this does not mean that they must write their names underneath the will; it is sufficient if they have written their names upon the will with the intention of attesting the testator's signature (*m*).

Alterations.

Any alteration in a will made subsequent to its execution must be executed in the same way as a will (*n*); but it is sufficient if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to the alteration, or at the foot or end of or opposite to a memorandum referring to the alteration and written

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(*h*) *Wyatt* v. *Berry*, [1893] P. 5; *Brown* v. *Skirrow*, [1902] P. 3.

(*i*) 15 & 16 Vict. c. 24.

(*k*) *Ib.* s. 1. See *Re Fuller*, [1892] P. 377; *Royle* v. *Harris*, [1895] P. 163; *Re Nicholls*, [1921] 2 Ch. 11. As to nuncupative or informal wills of soldiers or sailors, see Wills Act, 1837, s. 11; 28 & 29 Vict. c. 72, as amended by 60 & 61 Vict. c. 15; 57 & 58 Vict. c. 60, s. 177; *Gattward* v. *Knee*, [1902] P. 99; *Re Hiscock*, [1901] P. 78; *Re Stanley*, [1916] P. 192; *Re Coleman*, [1920] 2 I. R. 332; Theobald on Wills (ed. 8), Ch. viii.; and as to attestation, see *ib.* p. 33.

(*l*) 15 & 16 Vict. c. 24, s. 1.

(*m*) *Re Streatley*, [1891] P. 172.

at the end or some other part of the will (*n*). Alterations not duly executed may, however, be made valid by a codicil confirming the will (*o*).

What may be bequeathed.

As regards personal property, the Wills Act, 1837 (*p*), after repealing the former statutes relating to wills, enacts that every person may by his will (executed as above mentioned) dispose of all personal estate which he shall be entitled to, either at law or in equity, at the time of his death and which, if not so disposed of, would devolve upon his executor or administrator; and that the power thus given "shall extend to all contingent, executory, or other future interests in any personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested," and notwithstanding that he may become entitled to the property or interests subsequently to the execution of his will.

Gift to attesting witness.

Formerly a person to whom, or to whose wife or husband, any benefit was given by the will was considered not to be a credible witness to the will; under the Wills Act (*q*) such a person is a competent witness to prove the execution of the will, but the gift is void (*r*). A creditor or executor may be an attesting witness (*r*).

Infants.

Before the Wills Act, a boy of the age of fourteen and a girl of the age of twelve could make a valid will of personal property; but that Act provides that no will made by a person under the age of twenty-one years shall be valid (*s*).

Will *prima facie* speaks from death as to property bequeathed.

Every will is now construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention

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(*n*) Wills Act, 1837, s. 21.

(*o*) *Re Heath*, [1892] P. 253.

(*p*) Wills Act, 1837, ss. 2 and 3.

(*q*) *Ib.* ss. 14, 15.

(*r*) *Ib.* ss. 16, 17; *Re Pooley* (1889), 40 Ch. D. 1. S. 15 does not apply to the will of a soldier on actual military service, and a gift to an attesting witness of such will is valid: *Re Limond*, [1915] 2 Ch. 240.

(*s*) *Ib.* s. 7.

appears by the will (*t*). This provision has reference only to the question of what property passes by the will; it does not mean that whatever the testator says in the will is to be construed as if the will were made on the day of his death (*u*).

Lapse.

If a person to whom any personal estate is bequeathed dies before the testator, the bequest fails or "lapses," except where the legacy is of an entailed interest (*v*) or the legatee is a child or other issue of the testator and leaves issue living at the testator's death, in which cases the Wills Act provides (*x*) that the bequest shall take effect as if the legatee had died immediately after the death of the testator (unless a contrary intention appears by the will). This does not, however, apply where the gift is to children or other issue as a class, even if it happens that the class consists of but one individual (*y*). It will be observed that the effect is to make the property bequeathed part of the estate of the original legatee and not to give it to the issue of the legatee (*z*).

Joint tenancy.

If there be a bequest to several persons by name (as "to A., B., and C."), or by a general description of them as a class (as "the children of A."), without more, they take jointly, and if any one of them dies before the testator, the whole gift goes to those who survive. But if there be any words importing distinctness or plurality of interest among them (as "equally," "between," or "among" them, or if the "share" of any one is spoken of), they take as tenants in common. If, however, the gift be to a class (*a*), though as tenants in common,

Gift to a class.

(*t*) *Ib.* s. 24. As to the general personal estate, a will was construed in the same way before the Act. See Hawkins on Wills, Chap. I. Formerly a will did not pass land acquired by the testator after the date of the will.

(*u*) Per Lindley, L.J., *Re Portal and Lamb* (1885), 30 Ch. D. 55.

(*v*) S. 32; s. 130 (1) of Law of Property Act, 1925.

(*x*) Ss. 32 and 33. See *Re Scott*, [1901] 1 K. B. 228; *Re Griffiths*, [1911] 1 Ch. 246.

(*y*) *Re Harvey*, [1893] 1 Ch. 567.

(*z*) *Johnson* v. *Johnson* (1843), 3 Hare, 157; *Re Scott*, *supra*.

(*a*) As to what is a "class," see *Kingsbury* v. *Walter*, [1901] A. C. 187, 192; Theobald (ed. 8), 883 *et seq.*

the result is that the whole bequest is taken by the persons who form the class when the gift takes effect; thus, if a testator gives £1,000 to "the children of A. in equal shares," this is construed as a gift to those children of A. who shall be living at the testator's death, and there is no lapse by reason of the death of a child of A. before the testator, for such child is not a member of the class to whom the gift was made.

Revocation.

A will may be revoked by another will (*b*) or codicil duly executed, or by a writing declaring an intention to revoke the will and duly executed in the same manner as a will, or by the burning, tearing, or otherwise destroying the will by the testator, or by some person in his presence and by his direction, with the intention of revoking it (*c*). A will may also be revoked by subsequent marriage of the testator (*d*), unless expressed to be made in contemplation of such marriage (*e*) or unless it is in exercise of a power of appointment and the property appointed thereby would not in default of appointment pass to his or her representatives (*d*).

Revival of revoked will.

A will which has been revoked cannot be revived except by re-execution or by a codicil showing an intention to revive it (*f*).

Executor.

Formerly (*g*) it was essential in a will of personalty to appoint an executor, that is, "one appointed by a man's last will and testament to have the disposing and administration of all or a part of a man's goods and chattels and to perform a man's last will and testament, according to the contents thereof" (*h*). And it is still usual and proper to appoint an executor or several executors; but if there be no executor, the Court

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(*b*) S. 20.

(*c*) S. 20. See *Cheese* v. *Lovejoy* (1877), 2 P. D. 251; *Cadell* v. *Wilcocks*, [1898] P. 21; *Gill* v. *Gill*, [1909] P. 157; *Re Mackenzie*, [1909] P. 305.

(*d*) Wills Act, 1837, s. 18.

(*e*) Law of Property Act, 1925, s. 177. This applies only to wills made after the commencement of the Act.

(*f*) S. 22. *Re Chilcott*, [1897] P. 223.

(*g*) 2 Bl. 503.

(*h*) Shep. Touch. 400.

appoints an "administrator" with the will annexed (*cum testamento annexo*).

Beneficial interest of executor.

Under the old law the executor was entitled to the residue of the personal estate which was not disposed of by the will, unless it appeared from the will that he was not intended to take beneficially; but, by the Executors Act, 1830 (*i*), it was provided that the executor should hold that residue as trustee for the persons entitled to succeed on intestacy, unless it appeared by the will that he was intended to take beneficially. In the case of deaths occurring after 1925, the disposition of the residue will be governed by the Administration of Estates Act, 1925 (*k*).

Several executors.

A testator may appoint one executor or several. He may appoint a trust corporation as executor, either alone or jointly with another, and probate may be granted accordingly, but representation is not to be granted to a syndic or nominee on behalf of a trust corporation (*l*). If there are several executors, they "in the eye of the law are but as one man" (*m*); and therefore most acts done by or to any one of them are considered as done by or to all of them; for instance, payment of a debt by or to one of them is esteemed payment by or to all (*n*); and so one may make a sale or a mortgage or pledge (*o*) of goods or chattels of the testator; or compromise a claim against the estate even if it is a claim by a co-executor (*p*).

Executor according to the tenor.

An executor may be appointed by express words, or by implication, as by declaring that a man shall have certain rights which appertain to the office of executor, in which case he is called an "executor according to the

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(*i*) 1 Will. 4, c. 40. Repealed, as to deaths occurring after 1925, by Administration of Estates Act, 1925, s. 56.

(*k*) Ss. 46 and 49. See *post*, pp. 475 *et seq.*

(*l*) Judicature Act, 1925 (15 & 16 Geo. 5, c. 49), s. 161.

(*m*) Shep. Touch. 484.

(*n*) *Ib.* *Charlton* v. *Durham* (1869), 4 Ch. 433. *Secus*, as to one trustee, though he be also an executor, *Lee* v. *Sankey* (1873), 15 Eq. 204.

(*o*) Per Ld. Thurlow, C., *Scott* v. *Tyler* (1788), 2 Dick. 712, 725.

(*p*) *Re Houghton* (1904), 90 L. T. 252.

Qualified.

tenor" (*q*). The appointment may be made to begin either at the testator's death or at a future time, which may be certain, as five years after the testator's death, or when the executor shall come of age; or uncertain, as on the death or marriage of A (*r*); and the executorship may be made to last for a limited time only (*s*).

Limited executorship.

The appointment of an executor may be limited in point of place, or restricted to goods in certain places (*t*), or limited as to the subject-matter, *i.e.*, to goods of a particular nature (*u*). But, though the authority of the executors may be thus divided, still as regards creditors they are all entitled to act as executors generally.

Executorship survives;

descends to executor.

On the death of one of several executors, his executor is not executor of the original testator, but the office survives to the remaining executors; and, if all but one die, or if a sole executor dies, having proved the will (*x*), his executors, if he has appointed any, become the executors of the original testator; but the administrator (*y*) of an executor does not represent the original testator. Formerly, if there were several executors, one of whom proved and the rest renounced probate, and then he who proved died in the lifetime of one of those who renounced, no interest was transmitted to his executor (*z*); but the law was altered by the Court of Probate Act, 1857 (*a*), which provides that, where a person renounces probate, his rights in respect of the executorship shall wholly cease, and the representation of the testator shall go as if he had not been appointed executor.

(*q*) Godolph. Pt. 2, c. 5, s. 2; 1 Wms. Exors. Pt. 1, Bk. 3, ch. 2. For instances, see *Re Russell*, [1892] P. 380; *Re Wilkinson*, *ib.* 227; *Re Way*, [1901] P. 345; *Re Cook*, [1902] P. 114.

(*r*) Swinb. Pt. 4, s. 17, pl. 1, pl. 4; 1 Wms. Exors. Pt. 1, Bk. 3, ch. 3.

(*s*) Swinb. Pt. 4, s. 17, pl. 1; *Pemberton* v. *Cony* (1589), Cro. Eliz. 164.

(*t*) Swinb. Pt. 4, s. 18; *Velho* v. *Leite* (1864), 3 Sw. & Tr. 456; *Re Wallich* (1864), *ib.* 423; Y. B. 35 H. 6, 36.

(*u*) Dyer, 4 a; *Lynch* v. *Bellew* (1820), 3 Phill. 424.

(*x*) *Isted* v. *Stanley* (1588), Dy. 372 a. See Administration of Estates Act, 1925, s. 7.

(*y*) *Post*, pp. 458 *et seq.*

(*z*) *Arnold* v. *Blencowe* (1788), 1 Cox, 426.

(*a*) 20 & 21 Vict. c. 77, s. 79; Administration of Estates Act, 1925, s. 5.

Executor *de son tort*

An executor *de son tort* is a person who, not being executor or administrator of the deceased, intermeddles with his estate (*b*). By intermeddling he makes himself liable to the creditors of the deceased and to the payment of the death duties (*b*) as if he had been duly appointed executor, but he is not liable beyond the amount of the assets which come into his possession. He was not allowed formerly to derive any advantage from his wrongful intervention, and, before the legislation of 1925, was unable to retain a debt due to him in preference to other creditors of the same degree, a privilege possessed by the ordinary executor. But the effect of the Administration of Estates Act, 1925, appears to be to extend this privilege even to the executor *de son tort* (*c*).

Married woman executrix.

A married woman might at common law, with her husband's consent, be an executrix, but he was liable for her acts and defaults in the administration of the estate. She could, however, by a will made without his assent, appoint an executor of the property of which she was executrix. Under the Married Women's Property Act, 1882 (*d*), a married woman may accept the office of executrix without her husband's consent, and may deal with her testator's estate as if she were a *feme sole*. Her separate estate will be liable for any of her acts or defaults as executrix and her husband will not be responsible for them unless he has acted or intermeddled in the administration.

Renunciation of probate.

A person appointed executor may renounce probate, *i.e.*, decline to act, even if in the lifetime of the testator he has agreed to act (*e*). But the Court of Probate (*f*) may cite him to take or refuse (*g*) probate; and, if he administer, he will be liable to a penalty of £100 and

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(*b*) *Att.-Gen.* v. *New York Breweries Co.*, [1899] A. C. 62.

(*c*) S. 28.

(*d*) 45 & 46 Vict. c. 75, ss. 18, 24. See, as to the consent of the husband in cases before the Act, *Clerke* v. *Clerke* (1881), 6 P. D. 103.

(*e*) Per Ld. Redesdale, *Doyle* v. *Blake* (1804), 2 Sch. & Lef. 239.

(*f*) 20 & 21 Vict. c. 77, s. 23; Judicature Act, 1925, s. 159. See 21 Hen. 8, c. 5, s. 8.

(*g*) The refusal must be by act in Court; *Long* v. *Symes* (1832), 3 Hagg. Ecc. 776.

£10 per cent. duty (*h*) if he omit to take probate within six months.

If an executor renounces probate, or, having survived the testator, dies without having taken probate, or fails to appear when cited, or appears and refuses to act, his right as executor wholly ceases, and the representation of the testator devolves as if he had not been appointed executor (*i*); though, in a proper case, a co-executor who has renounced may be allowed by the Court to retract his renunciation (*k*). It follows that if he be the only person appointed executor, the case is the same as if no executor was appointed, and administration *cum testamento annexo* will be granted to another. If an executor once administers, he may be compelled to prove the will (*l*). He is considered to have administered if he does any act which would, if he had not been appointed executor, have made him executor *de son tort*; or if he deals with the goods and effects of the testator in such a manner as to show an intention of taking on him the executorship; as, for instance, if he receives or releases debts due to the testator, or takes and converts to the use of himself or others the goods of the testator (*m*).

When executor must prove.

Down to the time when the Court of Probate Act (*n*) was passed, wills of personalty were required to be proved in the court of the ordinary (*o*) of the place where the testator dwelt, *i.e.*, the court of the bishop of the diocese (*p*). Some few places, called Peculiars (*q*), were exempt from the jurisdiction of the bishop, and had an

Court of Probate.

(*h*) 55 Geo. 3, c. 184, s. 37. See also 57 & 58 Vict. c. 30, s. 8.

(*i*) 20 & 21 Vict. c. 77, s. 79; 21 & 22 Vict. c. 95, s. 16; Administration of Estates Act, 1925, s. 5.

(*k*) *Re Stiles*, [1898] P. 12. See Act of 1925, s. 6.

(*l*) *Graysbrook* v. *Fox* (1565), 1 Plow. 280 a; *Hensloe's Case* (1600), 9 Rep. 36 b.

(*m*) See the cases in the Year Books collected, 1 Roll. Ab. 917.

(*n*) 20 & 21 Vict. c. 77.

(*o*) The " ordinary " is " a bishop or any other that hath ordinary jurisdiction in causes ecclesiastical "; Co. Litt. 96 a.

(*p*) 2nd Inst. 398. See *Marriot* v. *Marriot* (1725), 1 Stra. 666.

(*q*) It is an ancient privilege of the See of Canterbury that any manors belonging to the See become peculiars of that See. In some cases the Courts Baron of Manors had jurisdiction as to probates.

ordinary of their own. A royal peculiar is one in which the jurisdiction was formerly in the Pope, and was vested in the Crown by 25 Hen. 8, c. 19. If the deceased had, at the time of his death, *bona notabilia*, *i.e.*, effects of the value of £5 or upwards (*r*), in a diocese or peculiar other than that in which he died, his will had to be proved in the "Prerogative" Court of the Archbishop of the Province of Canterbury or York, as the case might be (*s*). If he had goods in both provinces it was necessary to take out probate in each province. By the Court of Probate Act, 1857 (*t*), all jurisdiction as to granting probate of wills and letters of administration of the effects of deceased persons was vested in the Crown to be exercised in the Court of Probate. The jurisdiction of this Court was transferred to the High Court of Justice by the Supreme Court of Judicature Act, 1873 (*u*), and was assigned to the Probate, Divorce, and Admiralty Division (*x*).

Probate of will—evidence.

If an executor has occasion to assert his right as executor in any Court he must show that he has proved the will, which he does by producing a copy of it (called the probate) under the seal of the Court in which it was proved. The probate, or (if no executor is appointed or his appointment fails) letters of administration with the will annexed, are the proper legal evidence of the will in any question relating to personalty (*y*). The original will is deposited in the custody of the Court (*z*).

In order to construe a will, however, the Court may look at the original will as well as the probate copy (*a*).

Executor's title by will, not probate.

But the will, not the probate, gives authority to the

(*r*) See the 93rd Canon of 1603, which bound the Ecclesiastical Court; *More* v. *More* (1741), 2 Atk. 157. But this canon was, perhaps, declaratory of the existing law; *Middleton* v. *Crofts* (1736), 2 Atk. 653.

(*s*) 4th Inst. 335.

(*t*) 20 & 21 Vict. c. 77.

(*u*) 36 & 37 Vict. c. 66, s. 16; Judicature Act, 1925, s. 20.

(*x*) Act of 1873, s. 34; Act of 1925, s. 56 (3).

(*y*) See Dan. Ch. Pr. Ch. XII., s. 2 (2).

(*z*) Judicature Act, 1925, s. 170, now replaced by Administration of Justice Act, 1928, s. 11.

(*a*) *Re Harrison* (1885), 30 Ch. D. 390.

executor; the goods of the testator vest in him from the testator's death (*b*), and the probate is said to relate back to the death (*c*). Before probate the executor may do any acts incident to his office, except some which relate to actions (*d*), and the acts so done are good even where he dies without proving the will, if probate or letters of administration *cum testamento annexo* are ultimately granted (*e*). As a general rule, if an executor sues in his representative character, or relies on his right to possess as executor, he must prove that he is executor by production of the probate at the hearing or earlier. Of course, if the executor has obtained possession of the goods, he may maintain an action (formerly trespass or trover) in respect of the injury done to his possession (*f*) without proving that he is executor.

Powers and liabilities before probate.

It must, however, be noted that an executor may before probate maintain an action of any nature, provided he obtains probate before it is necessary to produce it (*g*); for, as above stated, the probate relates back to the death of the testator.

An executor named in a will can be sued as such if he has either administered, that is, intermeddled with the estate, or has proved the will by obtaining probate, but not otherwise (*h*). While the validity of a will is being disputed, an administrator appointed *pendente lite* can be sued by a creditor (*i*).

Assets in foreign countries.

Although probate granted in England does not enable the executor to sue in the colonies or in a foreign country, yet it is sufficient evidence of his being executor to enable

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(*b*) *Hensloe's Case* (1600), 9 Rep. 38 a; *Graysbrook* v. *Fox* (1565), 1 Plow. 281; *New York Breweries Co.* v. *Att.-Gen.*, [1899] A. C. 62. *Ante*, pp. 443-4.

(*c*) *Ingle* v. *Richards* (1860), 28 Beav. 366.

(*d*) *Wankford* v. *Wankford* (1705), 1 Salk. 299; Co. Litt. 292 b; *Middleton's Case* (1601), 5 Rep. 28 b.

(*e*) *Brazier* v. *Hudson* (1836), 8 Sim. 67; *Johnson* v. *Warwick* (1856), 17 C. B. 516.

(*f*) See *Pinney* v. *Pinney* (1828), 8 B. & C. 335.

(*g*) *Wills* v. *Rich* (1742), 2 Atk. 285; 1 Roll. Ab. 917.

(*h*) Plow. 280; *Douglas* v. *Forrest* (1828), 4 Bing. 704; 29 R. R. 695; *Mohamidu* v. *Pitchey*, [1894] A. C. 437.

(*i*) *Re Toleman*, [1897] 1 Ch. 866.

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him to sue in an English Court in respect of movable personal property of the deceased wherever situated (*k*).

Law of domicile governs formal validity.

As a general rule, the law of the place where a man is domiciled at the time of his death regulates the form of execution of his will, so far as regards movable personal property, and every circumstance on which its validity may depend (*l*).

Domicile.

"Domicile" is popularly used in the meaning of the place where a man lives or where he has his home. The various meanings in which the word is used in law, whether for ascertaining rights of succession, rights of belligerents, the forum of jurisdiction, or trading privileges are closely connected with the idea of home. When the word is used with reference to questions of succession, "the domicile of a person is the place where he has his true fixed permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning (*animus revertendi*)" (*m*). When used in this meaning, domicile must be distinguished from "residence," for a man may have several residences, though he can have but one domicile, and, as an infant has the domicile of his parents, it is possible for a person to be domiciled in a place in which he has never resided or never even been (*n*).

"Domicile," as applied to cases of succession, may mean (1) domicile of origin, or (2) domicile by operation of law, or (3) domicile of choice.

1. Domicile of origin.

1. The domicile of origin of a legitimate child is the domicile of his father; of an illegitimate child (and probably of a posthumous child) is the domicile of his mother at the time of his birth (*o*). If a child is born

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(*k*) *Whyte* v. *Rose* (1842), 3 Q. B. 493.

(*l*) Westlake, Private Internat. Law, ss. 80 *et seq.; Enohin* v. *Wylie* (1862), 10 H. L. C. 1; *Pepin* v. *Bruyere*, [1902] 1 Ch. 24; *Re Johnson*, [1903] 1 Ch. 821.

(*m*) Story, Conflict of Laws, § 41. See Dicey, Conflict of Laws, Ch. II., and App., Note 6; *Craignish* v. *Hewitt*, [1892] 3 Ch. 180.

(*n*) *Walcot* v. *Botfield* (1854), Kay, 534.

(*o*) *Udny* v. *Udny* (1869), L. R. 1 H. L. Sc. 441 (a leading case).

while his parents are temporarily absent from home, the place of his birth is not his domicile of origin (*p*).

2. Domicile by operation of law.

Wife.

2. By marriage it becomes the duty of the wife to live with her husband, and therefore she acquires his domicile (*q*); not only as a matter of law, but, if she lives with him, as a matter of fact her domicile changes with his (*r*), and she is unable during the coverture to acquire a domicile different from his, even if she is living apart from him under the provisions of a separation deed (*s*). On the other hand, if her husband has ceased to have the right to control her actions owing to her having been divorced *a vinculo matrimonii*, she can acquire a domicile different from his (*t*); but it is doubtful whether a divorce *a mensa et thoro* (*u*), or a judicial separation under 20 & 21 Vict. c. 85 (*x*), enables her to acquire a domicile different from his.

Infant child.

In like manner, the father of a legitimate infant child has the right to control its actions, and therefore the domicile of such a child changes with that of its father (*y*). After the death of the father, the domicile of an infant child generally, but not necessarily, changes with that of the mother if the child is living with her, until she re-marries (*z*); the mother has the power to change the domicile of the child by changing her own, but may refrain from exercising that power (*z*). The question is hardly settled whether a guardian has the power of changing the domicile of his ward (*a*).

(*p*) Story, Conflict of Laws, § 46.

(*q*) *Harvey* v. *Farnie* (1883), 8 App. Cas. 43.

(*r*) *De Nicols* v. *Curlier*, [1900] A. C. 21; *Re Martin*, [1900] P. 211; *Viditz* v. *O'Hagan*, [1900] 2 Ch. 87.

(*s*) *Warrender* v. *Warrender* (1835), 2 Cl. & F. 488; 37 R. R. 188.

(*t*) Westlake, Private International Law, § 253.

(*u*) *Williams* v. *Dormer* (1852), 2 Rob. 505; *Re Mackenzie*, [1911] 1 Ch. 578.

(*x*) *Dolphin* v. *Robins* (1859), 7 H. L. C. 390; *Re Mackenzie*, *sup.*

(*y*) *Sharpe* v. *Crispin* (1869), L. R. 1 P. & D. 611; *Craignish* v. *Hewitt*, [1892] 3 Ch. 180.

(*z*) *Potinger* v. *Wightman* (1819), 3 Mer. 67; 17 R. R. 20; *Johnstone* v. *Beattie* (1843), 10 Cl. & F. 138; 59 R. R. 23; *Re Beaumont*, [1893] 3 Ch. 490.

(*a*) *Potinger* v. *Wightman*, *sup.*; *Douglas* v. *Douglas* (1871), 12 Eq. 625; Story, Conflict of Laws, § 505.

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3. Domicile of choice.

3. A person *sui juris* may change his domicile whenever and as often as he likes, but in order to change his domicile he must not only intend to do so, but he must actually do so. In other words a new domicile, called domicile of choice, is acquired by the combination of residence and the intention permanently to reside in a given country, but not otherwise. There may be some doubt whether it is not also necessary that the person should have the intention of incorporating himself with the population of the country where he takes up his residence, so that the application of its law to him is in accordance with his wishes (*b*).

The domicile of origin continues unless a fixed and settled purpose, a final and deliberate intention, to abandon that domicile and acquire another as the sole domicile is clearly shown (*c*).

The domicile of choice continues until it is abandoned, either by acquiring another domicile of choice (*d*) or by leaving the place of domicile with the intention of not returning; in which case, until a new domicile of choice is acquired, the domicile of origin revives (*d*).

Ambassadors. Public servants.

The domicile of an ambassador or *chargé d'affaires*, and of the members of his suite, or of any person in the civil or military service of the Crown, is not changed by his service abroad (*e*).

It also appears that an officer who is not employed, but is liable to be employed, cannot acquire a foreign domicile (*f*). On the other hand, a person entering into the public service of a state in which he is not domiciled, probably acquires a domicile there (*g*). A person

Soldiers and sailors.

(*b*) *Moorhouse* v. *Lord* (1863), 10 H. L. C. 272; *Re Martin*, [1900] P. 211; *Re Johnson*, [1903] 1 Ch. 821; Westlake, Private International Law, § 254 *et seq*.

(*c*) *Winans* v. *Att.-Gen.*, [1904] A. C. 287; *Huntly* v. *Gaskell*, [1906] A. C. 56.

(*d*) Dicey, Conflict of Laws, p. 121; *Urquhart* v. *Butterfield* (1888), 37 Ch. D. 357; *Udny* v. *Udny* (1869), L. R. 1 H. L. Sc. 441; *Moorhouse* v. *Lord*, *sup*.

(*e*) *Douglas* v. *Douglas* (1871), 12 Eq. 617; *Sharpe* v. *Crispin*, *sup*.

(*f*) *Hodgson* v. *Beauchesne* (1858), 12 Moo. P. C. 285.

(*g*) *Ommaney* v. *Bingham* (1796), cited in *Somerville* v. *Somerville* (1801), 5 Ves. 757; 5 R. R. 155.

domiciled in the King's dominions does not change his domicile by entering the navy or army (*h*).

Persons not *sui juris.*

A person who is not *sui juris* cannot change his domicile of his own accord. In particular, an infant cannot do so (*i*).

Allegiance.

Naturalization.

Questions relating to domicile must be carefully distinguished from those relating to allegiance or naturalization (*k*). For instance, a British subject may be domiciled in America and naturalized in France. "Allegiance" is the tie which binds the subject to render political obedience to the Crown, so that the phrases "to owe allegiance to the King" and "to be a British subject" mean the same thing. Naturalization is where an alien becomes a British subject. A person born a British subject could not formerly throw off his allegiance, but the British Nationality and Status of Aliens Act, 1914 (amended by Acts of 1918 and 1922), embodying similar provisions contained in the Naturalization Act, 1870, enables him to do so where, on his birth, he became a subject of a foreign state as well as a British subject; and under the same Act a British subject who, while resident in a foreign state and under no disability, becomes naturalized there, ceases to be a British subject (*l*). This provision does not empower a British subject to become naturalized in an enemy state at war with this country (*m*).

Where a man dies domiciled abroad, leaving a will by which he appoints executors, which will has been proved by them in the proper Court of the country in which the testator died domiciled, the Court in this country will give to them ancillary probate of a duly authenticated

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(*h*) *Brown* v. *Smith* (1852), 15 Beav. 444; *Ex p. Cunningham* (1884), 13 Q. B. D. 418.

(*i*) *Urquhart* v. *Butterfield* (1888), 37 Ch. D. 357.

(*k*) *Udny* v. *Udny*, *sup.*; *Abd-ul-Messih* v. *Farra* (1888), 13 App. Cas. 431.

(*l*) British Nationality and Status of Aliens Act, 1914 (which repeals the Naturalization Act, 1870), ss. 13 and 14. See, as to British subjects, *post*, p. 502.

(*m*) *Rex* v. *Lynch*, [1903] 1 K. B. 444.

copy to enable them to obtain that part of the personal estate which is situated here without requiring further evidence of the validity of the will (*n*); for probate or letters of administration prove title only as to personal estate within the jurisdiction of the Court by which the probate or letters of administration are granted (*o*). Scotch probates and probates of wills of personalty of persons dying domiciled in Northern Ireland may be sealed by the English Court, and when so sealed have the same effect as if probate or administration had been granted in England (*p*).

Colonial probates.

By the Colonial Probates Act, 1892 (*q*), an Order in Council may direct that probate or letters of administration granted by a Court in a British possession (*r*), or by a British Court in a foreign country (*s*), may, on being produced and a copy thereof being deposited with the Probate Division, be sealed with the seal of the Court, and thereupon shall have the like effect as if granted by the High Court. The Act contains provisions for securing the payment of duty in respect of that part of the estate which is subject to duty in the United Kingdom, and for payment of debts due to creditors in the United Kingdom.

Lord Kingsdown's Act.

By an Act commonly known as Lord Kingsdown's Act (*t*), a will is not to be revoked, nor the construction of it altered, by any subsequent change of domicile of the testator. This provision applies to a will made abroad by an alien who has subsequently become domiciled in this country up to the time of his death (*u*).

By the same Act (*v*) every will made out of the

(*n*) Per Westbury, C., *Enohin* v. *Wylie* (1862), 10 H. L. C. 14.

(*o*) Westlake, Private International Law, § 95; *Att.-Gen.* v. *Bouwens* (1838), 4 M. & W. 193; 51 R. R. 517.

(*p*) Judicature Act, 1925, ss. 168 and 169; Administration of Justice Act, 1928, s. 10. See *Re Howden and Hyslop's Contract*, [1928] Ch. 479.

(*q*) 55 Vict. c. 6.

(*r*) *Ib.* s. 2. See *Re Smith*, [1904] P. 114.

(*s*) 55 Vict. c. 6, s. 3.

(*t*) 24 & 25 Vict. c. 114, s. 3.

(*u*) *Re Groos*, [1904] P. 269.

(*v*) S. 1.

United Kingdom by a British subject (*x*), whatever be his domicile at the time of making it or at his death, shall, as regards personal estate (*y*), be held to be well executed for the purpose of being admitted to probate, if made according to the forms required by the law of the place where it was made, or by the law of the place where the testator was domiciled at the time of making it, or by the law then in force in that part of His Majesty's dominions where he had his domicile of origin; and there is a similar provision (*z*) as to wills made *within* the United Kingdom by a British subject according to the forms required by the law of that part of the United Kingdom where the will is made.

Married women.

Since the Married Women's Property Act, 1893 (*a*), the will of a married woman made during coverture need not be re-executed or re-published after determination of the coverture, whether it was made before or after the passing of that Act (*b*). It takes effect as if it had been made immediately before her death (*b*).

Intestacy.

In ancient times when a man died intestate, his kinsmen appear to have been entitled by custom to superintend the distribution of his goods (*c*). Afterwards this jurisdiction was transferred to the ordinary (*d*), except in some places where it was vested in the lord of the manor. The ordinary was rendered liable by the Statute of Westminster the Second (*e*) to pay the debts of the intestate in the same manner that executors would be bound if he had left a will. By 31 Ed. 3, stat. 1, c. 11, in case of a man dying intestate, the ordinary was directed to "depute the next and most lawful friends

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(*x*) This does not apply to aliens, *Re Von Buseck* (1881), 6 P. D. 211; *Bloxam* v. *Favre* (1884), 9 P. D. 130; but it includes a naturalized subject; *Re Gally* (1876), 1 P. D. 438; *Re Lacroix* (1877), 2 P. D. 94.

(*y*) This includes leaseholds. *Re Grassi*, [1905] 1 Ch. 584.

(*z*) 24 & 25 Vict. c. 114, s. 2.

(*a*) 56 & 57 Vict. c. 63, s. 3. For the previous law, see *Bilke* v. *Roper* (1890), 45 Ch. D. 632; *Re Price* (1885), 28 Ch. D. 709.

(*b*) *Re Wylie*, [1895] 2 Ch. 116; *Re James*, [1910] 1 Ch. 157.

(*c*) Holdsworth, History of English Law, Vol. II., pp. 96-7.

(*d*) *Ante*, p. 449, n. (*o*); *Graysbrook* v. *Fox* (1565), 1 Plow. 277.

(*e*) 13 Edw. 1, c. 19. See *Smelling's Case* (1595), 5 Rep. 82 b.

of the dead person intestate to administer his goods," who were to have the powers of and to be accountable as executors (*f*).

Adminis-trators.

These "lawful friends" were called "administrators." They were officers of the ordinary, and their power was derived solely from him by means of "letters of administration." The rules for determining the ordinary having jurisdiction to grant letters of administration were the same as in the case of probate (*g*). The jurisdiction of the ordinaries exercised through the proper Courts, and of all other Courts, was vested in the Court of Probate by the Probate Act, 1857 (*h*). The jurisdiction of this Court is now exercised by the Probate, Divorce and Admiralty Division of the High Court of Justice. Until letters of administration are issued, the personal estate vests in the President of the Probate Division in the same manner as it formerly vested in the ordinary (*i*).

Who are entitled to letters of administration.

By 21 Hen. 8, c. 5, s. 3, administration was to be granted "to the widow of the deceased *or* to the next of kin *or* to both as by the discretion of the ordinary shall be thought good"; and the ordinary might grant administration to one or more making request out of divers next of kin.

Husband.

A husband formerly had the right of taking out administration to his wife (*k*). The right was confirmed by the Statute of Frauds (*l*), which provided that the Statute of Distribution (*m*) should not "extend to the estates of *femes coverts* that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates and enjoy the same as they might have done before the making of the said Act."

(*f*) See as to these statutes, per Lush, L.J., *Re Goodman's Trusts* (1881), 17 Ch. D. 276.

(*g*) *Ante*, pp. 449-50.

(*h*) 20 & 21 Vict. c. 77.

(*i*) Administration of Estates Act, 1925, s. 9.

(*k*) *Humphrey* v. *Bullen* (1737), 1 Atk. 459.

(*l*) 29 Car. 2, c. 3, s. 25.

(*m*) 22 & 23 Car. 2, c. 10.

The husband took subject to satisfaction of any liabilities of the wife enforceable against the property (*n*). If the husband died without taking out administration, the next of kin of the wife might obtain a grant of letters of administration, but held the beneficial interest for the personal representative of the husband (*o*).

Next of kin.

The "next and most lawful friends," and "the next of kin," entitled to a grant of administration under the statutes were defined by Coke (*p*) to be the next of blood not attainted of treason or felony or having any other lawful disability; but at the present day, as a general rule, the right to take out administration to the effects of an intestate follows the right to the property (*q*).

Grant to creditor.

If there are no next of kin, or none who will take out administration, a creditor may do so (*r*), because he cannot be paid his debt until there is a representative of the deceased.

The Supreme Court of Judicature (Consolidation) Act, 1925, now provides that in granting letters of administration the Court shall have regard to the rights of all persons interested in the real and personal estate of the deceased, or the proceeds of sale thereof, and in particular administration, with the will annexed, may be granted to a devisee or legatee; and any such administration may be limited in any way the Court thinks fit: provided that, where the deceased died wholly intestate as to his real and personal estate, administration shall be granted to some one or more of the persons interested in the residuary estate of the deceased, unless by reason of the insolvency of the estate or other special circumstances the Court thinks it expedient to grant administration to some other person (*s*).

(*n*) *Smart* v. *Tranter* (1890), 43 Ch. D. 593, 598; *Surman* v. *Wharton*, [1891] 1 Q. B. 491.

(*o*) *Smart* v. *Tranter*, *sup.*

(*p*) *Hensloe's Case* (1600), 9 Rep. 39 b.

(*q*) Per Sir J. Nicholl, *Re Gill* (1828), 1 Hagg. Ecc. 342; see Judicature Act, 1925, s. 162.

(*r*) 2 Blackstone, 505; *Re Heerman*, [1910] P. 357.

(*s*) S. 162.

Discretion of Court.

The Court has a wide discretion as to the grant of administration, and is not bound to make the grant to the person who formerly would have been entitled to such grant (*t*).

Limited administration.

In some cases, instead of administration being granted generally of the whole estate of the deceased, it is granted for a limited time, or for a limited purpose, or in respect of a part of the estate only. If the sole executor or next of kin is an infant, administration is granted to some other person to continue during the minority, and this is called administration *durante minore ætate* (*u*). If the sole executor or next of kin is out of the realm at the time of the decease, administration *durante absentiâ* may be granted to another to continue until the return of the executor or next of kin (*x*). If litigation is pending as to the right to probate or administration, a grant of administration *pendente lite* may be granted to continue until the litigation is determined (*y*). If there is no executor of a will, or none who will prove, the Court will grant administration *cum testamento annexo*, that is, with the will annexed (*z*). If an executor or administrator dies without having fully administered the estate, and, in the case of an executor, there is no executor of such executor, an administrator will be appointed *de bonis non administratis*, that is, to complete the administration of the estate (*a*).

Durante minore ætate.

Durante absentiâ.

Pendente lite.

Cum testamento annexo.

De bonis non.

Administering the estate.

A person entitled to take out administration cannot, as a general rule, act before letters of administration are granted to him, for he derives his authority solely from the Court (*b*); but, as soon as administration is granted, the power of the administrator is equal to the power of

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(*t*) 20 & 21 Vict. c. 77, s. 73; Act of 1925, s. 162.
(*u*) Act of 1925, s. 165.
(*x*) See Act of 1925, s. 164.
(*y*) Act of 1925, s. 163.
(*z*) Judicature Act, 1925, s. 166.
(*a*) See, as to limited administration, Williams, Executors, Pt. 1, Bk. V., Ch. 3.
(*b*) *Wankford* v. *Wankford* (1705), 1 Salk. 301; *Woolley* v. *Clark* (1822), 5 B. & Ald. 744; 25 R. R. 546.

an executor (*c*), and all the property of the deceased intestate, except such interests in property as terminate on his death, vest in the administrator.

What are assets.

The real and personal estate, whether legal or equitable, of a deceased person, to the extent of his beneficial interest therein, and the real and personal estate of which a deceased person in pursuance of any general power (including the statutory power to dispose of entailed interests) disposes by his will, are assets for payment of his debts (whether by specialty or simple contract) and liabilities, and any disposition by will to the contrary is void as against creditors (*d*).

But with regard to a disposition made by a beneficiary in good faith of his interest under a will or on intestacy, it is provided that where such disposition is made before an action is brought or process is sued out against him, he shall be personally liable for the value of the interest so disposed of by him, but that interest shall not be liable to be taken in execution in the action or under the process (*e*).

If an entailed interest in real or personal property is not disposed of by will, it will not form part of the assets of the deceased.

Legal and *equitable* assets.

The assets of a deceased person were formerly distinguished as *legal* or *equitable*.

This distinction referred to "the remedies of the creditor and not to the nature of the property; and whatever assets the Court of law would, in a creditor's action, charge the executor with, must be regarded as legal assets, that is to say, every item of property which the executor has a right to recover or which vests in him merely *virtute officii*" (*f*). Property which could be made available for the payment of debts only through a suit for administration in equity, *e.g.*, realty charged with the payment of debts, was termed "equitable assets" (*g*). This distinction, which had already lost

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(*c*) Shep. Touch. 474; Administration of Estates Act, 1925, s. 21.

(*d*) Administration of Estates Act, 1925, s. 32 (1).

(*e*) *Ib.* s. 32 (2).

(*f*) *Cook* v. *Gregson* (1856), 3 Drew. 549, per Kindersley, V.-C. See Snell, Equity (ed. 20), p. 225.

(*g*) Snell, Equity (ed. 20), p. 226.

much of its importance but was still operative in some cases, *e.g.*, with respect to an executor's or administrator's right of retainer, is deprived of any practical effect by the Administration of Estates Act, 1925, which provides that the right of retainer of the personal representative and his right to prefer creditors may be exercised in respect of all assets (*h*).

Property of which the deceased was only a trustee, or which he was bound to apply for a particular purpose, will not be assets in the hands of his executor or administrator. In some cases property will be assets in the hands of the executor or administrator, though it never belonged to the testator, as where he renews or accepts a lease, or receives property pursuant to an agreement entered into by the deceased.

Inventory.

The personal representative of the deceased is bound, when lawfully required so to do, to exhibit in Court on oath a complete inventory and account of the estate; and the Court may require personal representatives to bring in inventories (*i*).

Power of executor or administrator to sell or mortgage.

The executor or administrator has an absolute right to sell or mortgage (*k*) the personal assets of the testator or intestate, and they cannot be claimed by creditors or legatees as against the purchasers or mortgagees (*l*), even though the grant of administration or probate is subsequently revoked (*m*). If it were otherwise no one would deal with a personal representative : he must sell in order to do his duty, and no one would buy if he were liable to account (*n*). An executor may even dispose of a chattel specifically bequeathed, so long as he has not assented to the bequest.

Assets lost.

The executor or administrator has only to account for

(*h*) *Post*, p. 464.

(*i*) Administration of Estates Act, 1925, s. 25.

(*k*) *Ib*. ss. 37 and 39. See also s. 36 (6) (7) (8) (9) and (10); *Thorne* v. *Thorne*, [1893] 3 Ch. 196.

(*l*) *Ib*. See *Ellis* v. *Ellis*, [1905] 1 Ch. 613; *Attenborough* v. *Solomon*, [1913] A. C. 76.

(*m*) *Ib*. s. 37; *Hewson* v. *Shelley*, [1914] 2 Ch. 13.

(*n*) It need hardly be said that an executor cannot purchase from himself; *Hall* v. *Hallett* (1784), 1 Cox, 134; 1 R. R. 3.

the assets that come to his hands (*o*), and, if they come into his possession but are afterwards lost, he cannot be charged unless there be some wilful default on his part. He is in the position of a gratuitous bailee (*p*); and he is not to be charged with the debts due to the deceased till he has received them.

Devastavit.

A "*devastavit*," or waste, in an executor or administrator is where he misapplies the assets, as by paying legacies before debts, or a debt of lower degree before one of higher degree (*q*), or a debt which is unenforceable by reason of the Statute of Frauds (*r*). The executor is personally liable for any *devastavit*, but only as for a simple contract debt, which may be barred by the Statute of Limitations after the expiration of six years from the time when the *devastavit* was committed (*s*). If he has acted honestly *and* reasonably, he may now be relieved from personal liability by order of the Court (*t*).

Assets—how to be administered.

It is the duty of the executor or administrator to pay out of the assets in the first place the reasonable expenses of the funeral. If he gives orders for the funeral, or adopts the acts of another who has given such orders, he becomes *personally* liable for them (*u*). Secondly, he may retain the costs of obtaining probate or letters of administration, and other costs of administering the estate (*x*). Thirdly, he must pay the debts of the deceased according to their priority; *i.e.*, *first*, debts due to the Crown by record or specialty (*y*); *secondly*, certain debts to which priority is given by statute (*z*);

(*o*) *Read's Case* (1604), 5 Rep. 33 b.

(*p*) *Job* v. *Job* (1877), 6 Ch. D. 562.

(*q*) See Wms. Exors., Pt. IV., Bk. 2, ch. 2, s. 2; 2 Shep. Touch. 485.

(*r*) *Re Rownson* (1885), 29 Ch. D. 358.

(*s*) *Lacons* v. *Warmoll*, [1907] 2 K. B. 350.

(*t*) Trustee Act, 1925, s. 61, which repeals and re-enacts Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 3. *Re Kay*, [1897] 2 Ch. 518; *Re Stuart*, [1897] 2 Ch. 583; *Re Mackay*, [1911] 1 Ch. 300.

(*u*) *Lucy* v. *Walrond* (1837), 3 Bing. N. C. 841; 43 R. R. 815.

(*x*) *Loomes* v. *Stotherd* (1823), 1 Sim. & S. 461; 24 R. R. 209.

(*y*) 2nd Instit. 32 See *Re Bentinck*, [1897] 1 Ch. 673.

(*z*) See these collected in Williams on Executors, Pt. III., Bk. 2, s. 1 (3).

thirdly, debts of record other than Crown debts (*a*); *fourthly*, specialty and simple contract debts (*b*).

Insolvent estate.

But, in the administration of the assets of a deceased person whose estate is insolvent, *i.e.*, insufficient for payment of his debts and liabilities, including the costs of administration (*c*), the same rules are to prevail as if it were being distributed in bankruptcy (*d*). In such a case priority in respect of rates and wages and certain other payments is given by the Preferential Payments in Bankruptcy Act, 1888, and other modern statutes (*e*).

Executor or administrator may prefer a creditor.

The executor or administrator may, among creditors of equal degree, pay one in preference to another, *e.g.*, a simple contract debt in preference to a specialty debt (*f*); and may properly pay one creditor in full even after the commencement of an action by a creditor for administration of the estate (*g*), though not after a decree for administration or the appointment of a receiver (*h*). He may pay creditors of lower degree in priority to those of higher degree of which he has no notice (*i*).

Retainer;

An executor or administrator may "retain," or pay to himself, out of all assets (*k*) actually or constructively in his possession (*k*), a debt due to him from the deceased in preference to all other debts of equal degree (*l*), or to a debt of higher degree of which he has no notice (*m*); but not in preference to a debt in respect of which the creditor has obtained judgment against him as executor

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(*a*) *Ante*, p. 177.

(*b*) *Ante*, pp. 179-80.

(*c*) Act of 1925, s. 34 (1), and Part I. of Schedule I. of the Act; *Re Leng*, [1895] 1 Ch. 652.

(*d*) *Ib.*, replacing Judicature Act, 1875, s. 10, and extending the bankruptcy rules to all administrations of insolvent estates, whether by the Court or otherwise. See *Re Leng*, *sup.*; *Re Whitaker*, [1901] 1 Ch. 9. *Ante*, p. 180.

(*e*) 51 & 52 Vict. c. 62; National Health Insurance Act, 1924; Workmen's Compensation Act, 1925; Unemployment Insurance Acts, 1920-1927; *Re Heywood*, [1897] 2 Ch. 593. *Ante*, p. 391.

(*f*) Act of 1925, s. 34 (2); *Re Samson*, [1906] 2 Ch. 584.

(*g*) *Re Radcliffe* (1878), 7 Ch. D. 733.

(*h*) *Re Wells* (1890), 45 Ch. D. 575.

(*i*) *Re Fludyer*, [1898] 2 Ch. 562, 565.

(*k*) Act of 1925, s. 34 (2); *Pulman* v. *Meadows*, [1901] 1 Ch. 233.

(*l*) Williams, Executors, Pt. 3, Bk. 2, s. 6.

(*m*) *Re Fludyer*, *sup.*

or administrator (*n*); and he may exercise this right even after a decree for administration (*o*). If the debt due to him exceeds the value of the assets, he need not realize the assets, but may retain them in specie (*p*). He cannot exercise the right of retainer if he is an undischarged bankrupt (*q*); but the right applies only to debts owing to the personal representative in his own right, whether solely or jointly with another person; it does not apply where he has no beneficial interest in the debt, *e.g.*, when it is due to him only as a trustee for some one else (*r*). A widow who is executrix of her deceased husband, can retain the amount of a loan made by her to him for the purposes of his business (*s*). Before the Act of 1925, there was no right of retainer out of "equitable assets," and it was held that the Land Transfer Act, 1897, did not give the personal representative a right of retainer out of real assets (*t*), but now it extends to all assets (*u*).

by creditor administrator.

A creditor, to whom a grant of administration had been made, formerly had this right of retainer (*x*); but the form of the administration bond in his case has now been altered, and contains the words "not, however, preferring his own debt," so that he no longer has the right to retain his own debt in preference to other creditors (*y*).

Assent to legacy.

It being the duty of the executor to apply all the property devolving on him in payment of the testator's debts, no legatee acquires a perfect title to his legacy until the executor assents to it (*z*); but before the assent is given the legatee has an inchoate right which is transmissible to his personal representatives on his death

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(*n*) *Re Marvin*, [1905] 2 Ch. 490.
(*o*) See *Re Rhoades*, [1899] 2 Q. B. 347.
(*p*) *Re Gilbert*, [1898] 1 Q. B. 282.
(*q*) *Wilson* v. *Wilson*, [1911] 1 K. B. 327.
(*r*) Act of 1925, s. 34 (2).
(*s*) *Re Ambler*, [1905] 1 Ch. 697. See s. 3 of the Married Women's Property Act, 1882.
(*t*) *Holder* v. *Williams*, [1904] 1 Ch. 52.
(*u*) Administration of Estates Act, 1925, s. 34 (2).
(*x*) *Davies* v. *Parry*, [1899] 1 Ch. 602.
(*y*) [1899] W. N. 262.
(*z*) Co. Litt. 111 a.

before payment (*a*). The assent may be express or implied, and whether it has been given is generally a question of fact (*b*). It may, for instance, be implied if the legatee obtains possession of the thing bequeathed to him and retains it for some time without any complaint by the executor (*c*). When given it relates back to the date of the testator's death (*d*).

Executor's year.

The executor is not bound to pay a legacy till the expiration of one year from the testator's death, even if an earlier payment is directed by the will (*e*); and an administrator has a like period of delay.

Appropriation of specific assets to legacy.

An executor may appropriate a specific portion of the assets to a legatee in satisfaction of his legacy (*f*).

Legacies :

Legacies are either specific, general, or demonstrative (*g*).

—specific ;

A specific legacy is a gift of a definite thing or part of the testator's estate which the testator has clearly distinguished and separated from the rest of his estate at the time of his death (*h*), and which is to be handed over in specie to the legatee; for instance, a gift of a specific chattel belonging to the testator, as "the diamond ring given to me on my marriage," or of money in a bag (*i*), or of a debt or part of a debt due to the testator (*k*), is specific.

—specific, ademption of ;

A specific legacy, if it be of a thing belonging to the testator at the date of his will, is liable to be adeemed by the testator parting with it, or its identity being changed, in his lifetime (*l*), and the legatee will lose all

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(*a*) Went. Off. Ex. 69.

(*b*) *Thorne* v. *Thorne*, [1893] 3 Ch. 196.

(*c*) *Cole* v. *Miles* (1852), 10 Ha. 179.

(*d*) *Re West*, [1909] 2 Ch. 180.

(*e*) *Wood* v. *Penoyre* (1806), 13 Ves. 333; 9 R. R. 185.

(*f*) Act of 1925, s. 41; Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 4.

(*g*) See *Ashburner* v. *Macguire* (1786), 1 W. & T. L. C. 656.

(*h*) Per Lord Langdale, M.R., *Stephenson* v. *Dowson* (1840), 3 Beav. 342; 52 R. R. 149. See *Robertson* v. *Broadbent* (1883), 8 App. Cas. 812; *Re Clifford*, [1912] 1 Ch. 29; *Re Hawkins*, [1922] 2 Ch. 569.

(*i*) *Lawson* v. *Stitch* (1738), 1 Atk. 507.

(*k*) *Heath* v. *Perry* (1744), 3 Atk. 101.

(*l*) *Re Slater*, [1907] 1 Ch. 665; cf. *Re Clifford*, [1912] 1 Ch. 29.

benefit; if it be something which at the date of the will does not belong to the testator, but which he contemplates acquiring (*m*), the gift will fail if he never acquires the thing.

—general;

A general legacy is a gift of something which has to be provided at the cost of the testator's estate, as "*a* diamond ring," or £100 sterling, or £100 Consols, or an annuity (*n*). It is a legacy "which must be satisfied out of the testator's assets without reference to the nature of the property which he had at the date of his will or at the time of his death" (*o*).

—demonstrative.

A demonstrative legacy is one which is in its nature a general legacy, but is directed by the testator to be paid out of a particular fund (*p*); for example, "£1,000 out of my 3 per cent. Consols" (*q*). It has an advantage over a general legacy, as in case of deficiency of the estate for payment of all the legacies in full, it must nevertheless be paid in full out of the fund if the fund exists; but, on the other hand, if the fund does not exist, the legacy has to be paid out of the general assets.

Income of specific legacy, or of legacy set apart.

A vested specific legacy is regarded as separated from the testator's estate and appropriated to the legatee as from the time of the testator's death; and therefore dividends or interest accruing in respect of it before it is actually paid belong to the legatee (*r*). So a general legacy directed to be set aside at once on the testator's death carries interest from the death (*s*). But if a pecuniary legacy is contingent, and there is no provision

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(*m*) See *Stephenson* v. *Dowson*, *sup.*; *Queen's Coll.* v. *Sutton* (1842), 12 Sim. 521.

(*n*) As to an annuity, see *Heath* v. *Weston* (1853), 3 De G. M. & G. 601, 606; *Cunningham* v. *Foot* (1878), 3 App. Cas. 974, 989; *Re Willcocks*, [1921] 2 Ch. 327; Hawkins on Wills (ed. 3), 346.

(*o*) Per Fry, J., *Re Ovey* (1882), 20 Ch. D. 679.

(*p*) See per Ld. Thurlow, C., *Ashburner* v. *Macguire* (1786), 1 W. & T. L. C. (ed. 9), 656; *Dawson* v. *Reid* (1915), 113 L. T. 52.

(*q*) *Kirby* v. *Potter* (1799), 4 Ves. 748; 4 R. R. 342. But if it had been "£1,000 *Consols* out of my 3 per cent. Consols," or "£1,000 *part of* my 3 per cent. Consols," it would be specific; *ibid.* See *Re Pratt*, [1894] 1 Ch. 491.

(*r*) *Sleech* v. *Thorington* (1754), 2 Ves. sen. 563.

(*s*) *Dundas* v. *Wolfe Murray* (1863), 1 H. & M. 425.

for setting it apart from the rest of the estate, the interim income until the happening of the contingency falls into the residue of the testator's estate, or goes to the persons entitled on intestacy, as the case may be (*t*).

Where, however, the contingent legacy is specific, in the cases of wills coming into operation after 1925, it will carry the intermediate income from the death of the testator, except so far as otherwise disposed of by the will (*u*).

Interest on general legacy.

A general legacy which is immediate, that is, where payment is not to be deferred until a time named by the testator, or until the death of a person to whom the income is given for life, bears interest from the expiration of one year from the testator's death (*x*), unless it be given to a child of the testator or other person to whom he is *in loco parentis*, in which case it bears interest from his death (*y*).

A vested general legacy payable *in futuro* (*z*), or a contingent general legacy (*a*), bears interest only from the time at which it becomes payable, unless it be to an infant child of the testator or other person to whom he is *in loco parentis* (*b*).

Residue, what is.

A gift of the residuary personal estate of the testator includes every interest in his personal estate which, in the event, has not been effectually disposed of (*c*). Thus, it passes lapsed and void legacies and includes personal property over which the testator has a general power of appointment, and which he has by his will ineffectually appointed (*d*).

If, however, a gift of a share of residue, or of the residue of residue, fails, the subject of the gift does not

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(*t*) *Re Raine*, [1929] 1 Ch. 716.
(*u*) Law of Property Act, 1925, s. 175.
(*x*) *Wood* v. *Penoyre* (1806), 13 Ves. 325, 333; 9 R. R. 185.
(*y*) *Wilson* v. *Maddison* (1843), 2 Y. & C. C. C. 372; 60 R. R. 198.
(*z*) *Tyrrell* v. *Tyrrell* (1798), 4 Ves. 1.
(*a*) *Heath* v. *Perry* (1744), 3 Atk. 101.
(*b*) *Re Moody*, [1895] 1 Ch. 101.
(*c*) *Re Bagot*, [1893] 3 Ch. 348. Hawkins on Wills (ed. 3), 48.
(*d*) *Re Spooner* (1851), 2 Sim. N. S. 129.

fall back into the residue, but is undisposed of (*e*); unless there is a direction that it shall fall into residue (*f*), and the residue is given to persons capable of taking it.

Distribution of intestate's estate.

The Spiritual Courts, when they granted administration, endeavoured to compel the administrator to distribute the residue of the intestate's effects after payment of his debts among his next of kin; but their proceedings were hampered by prohibitions issued by the Courts of Common Law (*g*), the result being that the administrator was able to keep the residue for his own use. The law was altered by the Statute of Distribution (*h*), which provided (*i*) for the distribution of the residue "amongst the wife and children or children's children if any such be, or otherwise to the next of kindred to the dead person in equal degree, or legally representing their stocks"; that is to say, one-third to the wife, and two-thirds, by equal portions, to the children and such persons as legally represent such children *per stirpes* (*k*), in case any of the children be dead; but if there is no wife, the entirety is to go among the children and their representatives. Then there was a provision for any child of the intestate, other than the heir-at-law, bringing into hotchpot, so as to make the shares of all the children equal, any advances made or land settled on him by the intestate (*l*). If there were no children nor any "legal representative" of them, then one moiety of the estate was to be allotted to the wife and one moiety equally to the "next of kindred" who are in equal degree. If there were neither wife nor children, the entirety was to go among the next of kindred and their "legal representatives," but no representation was to be admitted among collaterals after

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(*e*) *Sykes* v. *Sykes* (1868), 3 Ch. 301.

(*f*) *Re Palmer*, [1893] 3 Ch. 369, 373; *Re Allan*, [1903] 1 Ch. 276.

(*g*) For the history of this, see Holdsworth, History of English Law, Vol. III., pp. 558-560; *Carter* v. *Crawley* (1663), T. Raym. 496.

(*h*) 22 & 23 Car. 2, c. 10.

(*i*) *Ib.* ss. 3, 5.

(*k*) *Re Natt* (1888), 37 Ch. D. 517.

(*l*) 22 & 23 Car. 2, c. 10, s. 5; *Proud* v. *Turner* (1729), 2 P. Wms. 560.

brothers' and sisters' children (*m*), and only among them if there were brothers and sisters living (*n*).

This Act applied to a partial intestacy (*o*); and also when a will became entirely inoperative owing to there being no person who could take any benefit under it at the death of the testator, for instance, where the sole beneficiary had predeceased the testator (*p*). It did not apply to the estates of married women dying intestate leaving a husband surviving (*q*).

Intestates Estates Act, 1890.

Under the Intestates Estates Act, 1890 (*r*), the estate of an intestate leaving a widow but no issue, where such estate did not exceed £500, was to go absolutely to the widow, and, if the value of the estate exceeded £500, in addition to her share of the residue, she was to have a charge on it to the amount of £500 with interest at the rate of £4 per cent. from the intestate's death. This Act applied when a person died without leaving a will (*s*); it did not, like the Statute of Distribution, apply to cases of partial intestacy (*s*).

These statutes are still applicable to the distribution of the residuary personal estate of any one dying intestate before January 1, 1926 (*t*).

Statute of Distribution.

In the Statute of Distribution (*u*), the words " children's children " mean " *issue* of children," and children and descendants of children are distinguished from next of kin (*u*). By " persons legally representing " children were meant their descendants in any degree, as distinguished from husbands or wives who survived children or their issue (*u*). " Next of kindred " meant next of kindred exclusive of issue of the intestate (*x*).

(*m*) *Ib.* s. 7.
(*n*) *Lloyd* v. *Tench* (1751), 2 Ves. sen. 215.
(*o*) *Twisden* v. *Twisden* (1804), 9 Ves. 413, 425; 7 R. R. 251; *Re Roby*, [1908] 1 Ch. 71.
(*p*) *Re Ford*, [1902] 2 Ch. 605.
(*q*) 29 Car. 2, c. 3, s. 25.
(*r*) 53 & 54 Vict. c. 29.
(*s*) *Re Twigg*, [1892] 1 Ch. 579.
(*t*) Administration of Estates Act, 1925, s. 54.
(*u*) S. 3.
(*x*) *Re Natt* (1888), 37 Ch. D. 517.

It was settled that children and issue of deceased children took *per stirpes*, not *per capita* (*y*), that is to say, the estate was divisible into as many shares as there were living children of the intestate and deceased children who had left issue; and the issue of a deceased child took between them only the share which their deceased parent would have taken. Thus, if there were one child of the intestate and three grandchildren, children of a deceased child, the child took one-half and the three grandchildren took one-half between them. A posthumous child took the same as if it were born in its father's lifetime (*z*).

Advancement.

The provisions as to advancement and hotchpot contained in the Statute of Distribution (*a*) applied to the estates of an intestate *father* only (*b*), and to the case in which he died without a will and not to partial intestacy (*c*); they did not apply to brothers and sisters or more remote next of kin (*d*). The issue of a child who had been advanced could not claim anything without bringing into hotchpot the amount advanced to that child (*e*). An advancement is any sum of considerable amount paid by the father or engaged to be paid by him after his death, as distinguished from sums of trivial amount, as pocket-money, a watch, or clothes (*f*), or sums expended on maintenance, education, or on the travelling expenses of a child (*g*). The heir at law, though he had not to bring into account the value of land which came to him by descent or otherwise from the intestate, was required to bring advances of personalty into hotchpot (*h*).

(*y*) *Re Natt*, *sup.*; *Re Ross* (1872), 13 Eq. 286.

(*z*) *Wallis* v. *Hodson* (1740), 2 Atk. 117.

(*a*) S. 5.

(*b*) *Holt* v. *Frederick* (1728), 2 P. Wms. 356. The law appears to be settled, though the reasons given for the decision may not convince the reader.

(*c*) Per Sir W. Grant, *Walton* v. *Walton* (1807), 14 Ves. 324; *Re Roby*, [1908] 1 Ch. 71.

(*d*) *Re Gist*, [1906] 2 Ch. 280.

(*e*) *Proud* v. *Turner* (1729), 2 P. Wms. 560.

(*f*) Swinb. Pt. 3, s. 18, pl. 30; *Pusey* v. *Desbouvrie* (1734), 3 P. Wms. 317, note.

(*g*) Swinb. Pt. 3, s. 18, pl. 19; *Morris* v. *Burroughs* (1737), 1 Atk. 403.

(*h*) *Pratt* v. *Pratt* (1730), Fitzgib. 284.

Chap. XIX.

"Kindred."

By "kindred" is meant the connection between persons who are descended from a common ancestor.

"Lineal."

The kindred that exists between persons, one of whom is descended from the other, is called "lineal." Each generation constitutes a degree, reckoning either upwards or downwards. Thus, there is one degree between father and son; there are two degrees between grandfather and grandson.

"Collateral."

The kindred that exists between persons, one of whom is not descended from the other, is called "collateral." The degrees are computed by reckoning from one of the parties up to the common ancestor and then down to the other, each generation constituting a degree, whether the reckoning is upwards or downwards. Thus there are two degrees between brother and sister, three between uncle and nephew. Persons of different relationship to a given person may be related to him in the same degree; thus, a great-great-grandchild, a grandchild of a brother, and the daughter of an uncle are all in the same degree, viz., the fourth.

If the nearest of kin to an intestate were brothers and sisters and a grandfather or grandmother, all of whom were of the second degree, it might be thought that they would share equally; but it was decided that the grandparent took nothing (*i*).

Intestate who leaves no child;

If an intestate left no children or representatives of children, his father, if living, took the whole, or if there were a widow, one-half; and under the first Statute of Distribution (22 & 23 Car. 2, c. 10), if the intestate left no wife or child or child's representative, or father, his mother, being his sole next of kin in the first degree, was entitled to all his personal estate; but it was provided by the statute 1 Jac. 2, c. 17 (*k*), that in such a case "every brother and sister and the representatives of them shall have an equal share with the mother."

no child or father, but mother.

Intestate who leaves wife.

It was decided on the construction of this statute

(*i*) *Winchelsea* v. *Norcliff* (1686), Freem. Chanc. 95; *Evelyn* v. *Evelyn* (1754), 3 Atk. 762.

(*k*) S. 7.

1 Jac. 2 that, if the intestate left a wife, the Act applied to the part not taken by her (*l*); that it applied to the case where all the brothers and sisters were dead, some of them leaving children; and that the proviso in the Statute of Distribution (*m*) restricting representation of brothers and sisters to their children applied to this Act (*n*). It will be noticed that, if the intestate left no wife, child, father, brother, sister, nephew or niece, this Act did not apply, and the mother took the whole (*o*).

Half-blood.

No preference was given to next of kin of the whole blood over those of the half-blood, as in the case of descent of real estate.

Recapitulation.

The result of these statutory provisions was that personal estate, as to which a man, or a woman not under coverture (*p*), died intestate before January 1, 1926, was (subject to payment of debts and of the expenses of funeral, of letters of administration and of administration) distributed as follows :—

(1.) The widow (if any) of the intestate took one-third, if the intestate left any children or descendants of children; in every other case, in addition to the £500 to which she was entitled under the Intestates Estates Act (*q*), she took one-half.

Subject to the rights of the widow :—

(2.) If the intestate left any children or other lineal descendants, they took the whole *per stirpes* as above pointed out.

Thus,

(a) If there were children only and no descendants of any deceased child, the children took in equal shares;

(b) If there were children and also descendants of deceased children, the estate was divisible into

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(*l*) *Keylway* v. *Keylway* (1726), 2 P. Wms. 344; Gilb. Eq. Ca. 189.

(*m*) 22 & 23 Car. 2, c. 10, s. 7; *ante*, p. 469.

(*n*) *Stanley* v. *Stanley* (1739), 1 Atk. 455.

(*o*) *Jackson* v. *Prudhom* (1716), 11 Vin. Ab. 196, tit. Exors. Z. 12.

(*p*) As we have pointed out (*ante*, p. 470), the husband of a married woman was entitled to all her personal property undisposed of. See also *post*, Chap. XX.

(*q*) *Ante*, p. 470.

as many shares as there were children and deceased children of the intestate, and the share of any deceased child went to his or her children or remoter issue, the children of any deceased person taking the share which that person would have taken if living;

(c) If all the children were dead, the estate was divisible into as many shares as there were children of whom there are any living descendants, and each share was subdivided among such descendants *per stirpes*.

(3.) If the intestate left no children or descendants of any child, his father, if living, took the whole.

(4.) If the father was dead, the mother, brothers, and sisters of the intestate took in equal shares; or, if any brother or sister were dead leaving children living, such children took the share which their deceased parent would have taken.

(5.) If the mother were living, but no brother or sister, or child of any deceased brother or sister, the mother took the whole.

(6.) If the mother were dead, the brothers and sisters, or children of deceased brothers and sisters, took the whole *per stirpes*.

(7.) If the mother and all the brothers and sisters were dead, the children of the brothers and sisters took *per capita* as next of kin together with uncles and aunts, if any (*r*).

(8.) If there were no children, or remoter issue, and no father or mother, or brothers or sisters, nephews or nieces, the estate was divisible equally among such persons as were in the nearest degree of kindred to the intestate.

"Next of kin" and "next of kin according to the statutes" distinguished.

The phrases "next of kin" and "next of kin according to the statutes for the distribution of the estates of intestates" often occur in deeds and wills.

(*r*) *Durant* v. *Prestwood* (1738), 1 Atk. 454; *Davers* v. *Dewes* (1730), 3 P. Wms. 50.

By " next of kin " *simpliciter* are meant the nearest of kin in the strict meaning of the word; while " next of kin according to the statutes," &c., include those persons who, not being themselves next of kin, take as representing deceased next of kin (*s*); and a reference to intestacy has the same effect as a reference to the statute; *e.g.*, a gift to " my next of kin as if I had died intestate " (*t*).

In the case of persons dying after January 1, 1926, the distribution of the residuary estate, both real and personal, will be governed by the provisions of Part IV. of the Administration of Estates Act, 1925 (*u*). These may be summarised as follows :—

Order of succession to residuary estate on intestacy after Jan. 1, 1926.

I. If the intestate leaves a husband or wife surviving, such surviving spouse will be entitled to—

(i) the personal chattels of the deceased absolutely. The expression " personal chattels " includes all manner of household furniture and effects and articles of personal use and ornament other than money or securities for money and things used for business purposes (*x*);

(ii) a charge on the residuary estate (other than the personal chattels) for the payment of a net sum of £1,000 free of death duties and costs, with interest at 5 per cent. per annum from the date of the death until paid or otherwise satisfied (*y*);

(iii) in default of issue (*z*) of the intestate, a life interest in the whole of the residuary estate;

(iv) if the intestate leaves issue (*z*) surviving, a life interest in one-half of the residuary estate; the

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(*s*) Elph. N. & C. Interp. 376 *et seq.*; Hawkins on Wills (ed. 3), 128; *Re Richards*, [1910] 2 Ch. 74. As to the construction of such expressions in wills coming into operation after 1925, see A. of E. Act, 1925, s. 50 (1), *post*, p. 480.

(*t*) Hawkins on Wills (ed. 3), 129; *Akers* v. *Sears*, [1896] 2 Ch. 802. See *Re Parsons* (1890), 45 Ch. D. 51, 63; *Re Morgan*, [1920] 1 Ch. 196.

(*u*) 15 Geo. 5, c. 23.

(*x*) S. 55 (1) (x).

(*y*) This interest is a charge on the capital of the estate, not upon the income : *Re Saunders*, [1929] 1 Ch. 674.

(*z*) *I.e.*, issue who attain an absolutely vested interest (see s. 47 (2) (b) and (c)).

residuary estate, subject to such life interest in one-half, being held on the " statutory trusts " for the issue of the intestate, but if those trusts fail or determine in the lifetime of the surviving spouse, then upon trust for the surviving spouse during the residue of his or her life.

II. If the intestate leaves issue (*z*), but no husband or wife surviving, the residuary estate is to be held on the " statutory trusts " for the issue.

III. If the intestate leaves no issue (*z*), but both parents surviving, then, subject to the interests of a surviving spouse, the residuary estate is to be held in trust for the father and mother in equal shares absolutely; but in case of only one parent surviving, then, subject as aforesaid, for such surviving parent absolutely.

IV. In default of issue or parent, then, subject to the interests of a surviving spouse, the residuary estate is to be held in trust for the following persons living at the death of the intestate, in the order and manner following :—

(1) on the " statutory trusts " (*a*) for the brothers and sisters of the whole blood of the intestate; but if no person takes an absolutely vested interest under such trusts, then

(2) similarly for the brothers and sisters of the half-blood; but if no person takes an absolutely vested interest under such trusts, then

(3) for the grandparents of the intestate, and if more than one surviving the intestate, in equal shares; but if there is no member of this class, then

(4) on the " statutory trusts " (*a*) for the uncles and aunts of the intestate (being brothers and sisters of the whole blood of a parent of the intestate); but if no person takes an absolutely vested interest under such trusts, then

(5) on the " statutory trusts " (*a*) for the uncles and aunts of the intestate (being brothers and

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(*z*) See note (*z*), *ante*.

(*a*) *Infra*.

sisters of the half-blood of a parent of the intestate); but if no person takes an absolutely vested interest under such trusts, then

(6) for the surviving spouse of the intestate absolutely.

V. In default of any person taking an absolute interest under the foregoing provisions, the residuary estate is to go to the Crown or to the Duchy of Lancaster or to the Duke of Cornwall for the time being, as the case may be, as *bona vacantia* (*b*).

"Statutory trusts" for issue.

The "statutory trusts" for the issue are the following:—

(i) In trust, in equal shares if more than one, for all or any the children or child of the intestate, surviving him, who attain the age of twenty-one years or marry under that age, and for all or any of the issue, under similar conditions, of any child of the intestate who predeceases the intestate, such issue to take *per stirpes*, but so that no issue shall take whose parent is living at the death of the intestate and capable of taking;

Advancement.

(ii) the statutory power of advancement, and the statutory provisions which relate to maintenance and accumulation of surplus income, shall apply, but when an infant marries, such infant shall be entitled to give valid receipts for the income of his or her share or interest (*c*).

The statutory power of advancement is contained in s. 32 of the Trustee Act, 1925, which authorises trustees, where the trust property consists of money or securities or of property directed to be converted into money (where such money, &c. is not by statute or in equity deemed to be land or capital money for the purposes of the Settled Land Act, 1925) to apply such property in their discretion for the advancement

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(*b*) Administration of Estates Act, 1925 (15 Geo. 5, c. 23), s. 46.

(*c*) S. 47 (1).

or benefit of any person entitled thereto whether absolutely or contingently on the attaining of any specified age or on the occurrence of any other event, but the money so paid by way of advancement must not exceed one-half of the presumptive or vested share or interest of that person, and must not be made to the prejudice of any person entitled to a prior interest without his written consent (*d*).

Maintenance and accumulation.

The statutory provisions relating to maintenance and accumulation are contained in s. 31 of the Trustee Act, 1925, which authorises trustees holding any property in trust for any person for any interest whatsoever, whether vested or contingent, to apply during the minority of such person the whole or such part of the income of the property as may in all the circumstances be reasonable, for or towards his maintenance, education or benefit, and on such person attaining majority to pay the income of the property and of any accretion thereto by way of accumulation to him until he either attains a vested interest or dies, or until failure of his interest. During the infancy of any such person, if his interest so long continues, the trustees are to accumulate any portion of the income not required for the purpose aforesaid in the way of compound interest by investing the same and the resulting income thereof in authorised investments for the benefit of the persons entitled in succession. But during the minority of a person having an interest in the property, the trustees may apply the accumulations, or any part thereof, as if they were income arising in the then current year (*e*).

Hotchpot.

(iii) Where the property held on the statutory trusts for issue is divisible into shares, any money

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(*d*) Trustee Act, 1925, s. 32.

(*e*) S. 31.

or property which by way of advancement or marriage settlement has been received by a child of the intestate from the intestate, subject to any contrary intention expressed or appearing from the circumstances of the case, is to be brought into hotchpot in calculating the shares (*f*).

(iv) The personal representatives may permit any infant contingently interested to have the use and enjoyment of any personal chattels in such manner and subject to such conditions (if any) as they may consider reasonable, and without being liable to account for any consequential loss (*g*).

(v) If the trusts in favour of the issue of the intestate fail by reason of no child or other issue attaining an absolutely vested interest, the residuary estate of the intestate and any accretions thereto shall devolve and be held as if the intestate had died without leaving issue surviving him (*h*).

"Statutory trusts" for relatives other than issue.

The "statutory trusts" in the case of any class of relatives of the intestate other than issue of the intestate correspond to the statutory trusts for the issue of the intestate, except as to bringing advancements into hotchpot, with the substitution of references to the members or member of that class for references to the children or child of the intestate (*i*).

Entailed interest.

Partial intestacy.

These provisions for devolution of property on intestacy do not affect the devolution of an entailed interest as an equitable interest (*k*). They apply in cases of partial intestacy, subject to any provisions contained in the will and subject to the bringing into hotchpot by issue (but not any other persons) of any beneficial interests acquired by them under the will of the deceased (*l*).

(*f*) Administration of Estates Act, 1925 (15 Geo. 5, c. 23), s. 47 (1) (iii).

(*g*) S. 47 (1).

(*h*) S. 47 (2).

(*k*) S. 51 (4).

(*i*) S. 47 (3).

(*l*) S. 49.

References to Statutes of Distribution.

References to any Statutes of Distribution in an instrument *inter vivos* made or in a will coming into operation after January 1, 1926, shall be construed as referring to Part IV. of the Act; and references in such an instrument or will to statutory next of kin shall be construed, unless the context otherwise requires, as referring to the persons who would take beneficially on an intestacy under the Act (*m*).

Trusts declared in an instrument *inter vivos* made, or in a will coming into operation, before January 1, 1926, by reference to the Statutes of Distribution, shall, unless the contrary thereby appears, be construed as referring to the enactments (other than the Intestates' Estates Act, 1890) relating to the distribution of effects of intestates (*n*) which were in force immediately before January 1, 1926 (*o*).

Probate duty.

Formerly probate duty upon the value of the personal estate was payable upon the grant of probate or letters of administration in respect of the assets of the deceased situated within the jurisdiction of the Court. Now, by the Finance Act, 1894 (*p*), "estate duty" is payable upon the whole of the property passing on the death of any person (subject to some exceptions), at rates graduated according to the total value of the estate, and the executor or administrator has to pay the duty at that rate upon the personal property of the deceased.

Estate duty.

Legacy duty.

Legacy duty also is payable on the payment or delivery of any legacy, with some exceptions, at a rate which varies according to the relationship of the legatee to the deceased (*q*).

Probate duty and legacy duty distinguished.

The object of the Acts imposing probate duty, now "estate duty," is to tax the property to which title is given or perfected by the letters of administration or by the probate, and to levy that tax prior to administra-

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(*m*) S. 50 (1).

(*n*) *I.e.*, 22 & 23 Car. 2, c. 10; 29 Car. 2, c. 3; 1 Jac. 2, c. 17.

(*o*) S. 50 (2).

(*p*) 57 & 58 Vict. c. 30, ss. 1-22, as amended by later Finance Acts.

(*q*) Upon this subject generally, see Hanson's Death Duties.

tion; while the object of the imposition of legacy duty is to tax the property actually taken by the successors of the deceased and to levy that tax at the time when the enjoyment accrues (r).

(r) *Blackwood* v. *The Queen* (1883), 8 App. Cas. 90.

CHAPTER XX.

PERSONS UNDER DISABILITY.

Married Women—Infants—Lunatics—Aliens.

§ 1. *Married Women* (*a*).

Chap. XX.

Common Law—Equity—Statutes.

THE position of a married woman in respect of personal property is to be considered (1st), as it was defined by the common law; (2ndly), in respect of the rights given to her in equity by means of trusts of property to be held for her separate use; and (3rdly), in respect of the proprietary rights conferred by modern statutes, viz., The Married Women's Property Acts, 1870 (*b*), 1882 (*c*), 1893 (*d*), and 1907 (*e*).

Common Law—chattels in possession.

(1.) At common law the marriage is an absolute and unqualified gift to the husband of all chattels personal of the wife in possession in her own right, whether belonging to her at the time of the marriage or acquired subsequently during the coverture, and whether he survives her or not. The property is divested out of the wife and vested in the husband only: he may dispose of it in his lifetime or by his will, and it passes to his executors or administrators as part of his personal estate (*f*). The effect of marriage on the wife's chattels

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(*a*) It is not practicable within the limits of this work to give more than an outline of the proprietary rights of married women in personal property; for further information on the subject the reader is referred to the text-books specially dealing with it, which must also be consulted as to the contractual obligations of married women, and other matters outside the scope of this treatise. As to the history of the law of England with respect to married women's property, see the Yorke Prize Essay (1878) on the subject, by C. S. Kenny; and Jenks's Short History of E. L., pp. 225-229, 313-14. Carson's Real Property Statutes (ed. 3) 347 *et seq.*

(*b*) 33 & 34 Vict. c. 93.

(*c*) 45 & 46 Vict. c. 75.

(*d*) 56 & 57 Vict. c. 63.

(*e*) 7 Edw. 7, c. 18.

(*f*) Co. Litt. 351 b.; *Purdew* v. *Jackson* (1824), 1 Russ. 1, 59, 65.

personal in possession was a consequence of the doctrine that, for most purposes, "husband and wife are but one person in law" (*g*).

Will of married woman.

The wife, may, however, dispose of her personal estate by a will made with the consent of her husband; that consent may be given at any time, even after the death of the wife, but it can be revoked at any time before probate of the will (*h*).

Paraphernalia.

The only exception to the rule appears to be in the case of "paraphernalia" of the wife, that is, apparel and ornaments suitable to the wife's condition in life, and given to her by her husband for her use as his wife, as ornaments of her person only. Of these the husband cannot dispose by will, but he can dispose of them in his lifetime by sale or gift. The wife cannot dispose of them during her husband's lifetime, but if she survives him they belong to her, subject, however, to his debts, if his other assets are insufficient (*i*). An agreement between husband and wife that the wife's wearing apparel purchased by the husband should be his absolute property has been held to be valid, so that it could not be taken in execution under a judgment obtained against the wife (*k*).

It has been held that the Married Women's Property Acts have not affected the law as to gifts of paraphernalia (*l*); but Farwell, L.J., has expressed the opinion that since those Acts this exception to the husband's rights has ceased to exist (*m*). Gifts by strangers to the wife, or gifts by the husband not as paraphernalia, are the separate property of the wife (*n*).

(*g*) Litt. s. 291. See Kenny on Married Women, pp. 7 *et seq.*; *Phillips* v. *Barnet* (1875), 1 Q. B. D. 440, per Lush, J.

(*h*) See *Elliott* v. *North*, [1901] 1 Ch. 424.

(*i*) See *Graham* v. *Londonderry* (1746), 3 Atk. 393; *Tasker* v. *Tasker* [1895] P. 1; *Masson* v. *De Fries*, [1909] 2 K. B. 394; and cases cited in notes to *Hulme* v. *Tenant*, in 1 W. & T. L. C. (ed. 9) 555.

(*k*) *Rondeau & Co.* v. *Marks*, [1918] 1 K. B. 75.

(*l*) *Tasker* v. *Tasker*, *sup.*

(*m*) *Masson* v. *De Fries*, *sup.*

(*n*) *Masson* v. *De Fries*, *sup.*; *Tasker* v. *Tasker*, *sup.*; *Ex p. Pannell* (1889), 37 W. R. 464.

Common Law —choses in action.

A chose in action being a right of action to recover something which is not in possession, may be either an immediate right of action to obtain possession of the property or a future right of action to obtain such possession at a future time, in which case it is commonly called a "reversionary chose in action." Thus, a debt to recover which there is a present right of action, or a legacy immediately payable, is to be distinguished from a right to recover or obtain property after the death of a living person, as where a fund is held by trustees upon trust to pay the income to A. during his life, and after his death to transfer the fund to B.; here B. has during A.'s life a reversionary chose in action.

"The nature and extent of the husband's interest in and power over the wife's choses in action is," it has been said (*o*), "of a peculiar nature. Marriage, the law says, is only a qualified gift to the husband of the wife's choses in action, viz., upon condition that he reduce them into possession during its continuance. If he happen to die before his wife without having reduced such property into possession, she, and not his personal representatives, will be entitled to it. The wife's right is not divested by the marriage. The chose in action continues to belong to her, unless the husband can and does reduce it into possession and thereby makes it cease to be a chose in action. The husband has not on the marriage any immediate property in the chose in action; he has only the right to reduce it into possession if it be in a state capable of being so reduced. Reduction into possession is a necessary and indispensable preliminary to the husband's having any right of property in himself or to his being able to convey any right of property to another. If he dies without having been able or willing to perform this condition, the right of the wife continues unaltered exactly as if she had never married. Her title is the same after her husband's death as it

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(*o*) Per Ld. Gifford, M.R.; *Purdew* v. *Jackson* (1824), 1 Russ. 66; 25 R. R. 5.

was before her marriage. The husband had a power, but he had never exercised it; or the chose in action was so circumstanced" [as, for instance, where it is reversionary] "that he could not exercise it so as to fulfil the condition upon which his title depended" (*p*).

What is "reduction into possession."

No general rule can be laid down as to what amounts to reduction into possession (*q*). Some act must be done which will have the effect of changing the property in the chose in action, or giving the husband control over the chose without the necessity of an action (*r*), or enabling the husband to sue for it as had and received to his use (*s*). The husband must, for some moment of time, have obtained absolute dominion over the property (*t*).

Death of wife.

We have seen that, if the husband died in his wife's lifetime, without having reduced the chose in action into possession, it belonged to the wife by survivorship. On the other hand, if the wife died in her husband's lifetime, he was entitled to her choses in action not reduced into possession upon taking out letters of administration to her (*u*); and if he died without having taken out administration to her, his beneficial interest passed to his personal representatives (*x*).

Reversionary chose in action.

So long as a chose in action was reversionary there could of course be no reduction into possession by the husband. An assignment of it by him would not operate as a reduction into possession (*y*), and would not defeat the wife's right by survivorship, which was a legal right against which the equitable right, if it existed, of the assignee could not prevail (*y*). The assignment by the husband could not pass more than his right to reduce the chose into possession if he should be able to do so,

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(*p*) See *Fleet* v. *Perrins* (1868), L. R. 3 Q. B. 536; 4 *id*. 500.

(*q*) See notes to *Hornsby* v. *Lee* (1816), in 1 W. & T. L. C. (ed. 9) 158.

(*r*) Per Fry, J., *Re Barber* (1879), 11 Ch. D. 442. And see 2 Spence, Eq. Jur. 478.

(*s*) *Aitchison* v. *Dixon* (1870), 10 Eq. 589.

(*t*) *Nicholson* v. *Drury* (1878), 7 Ch. D. 55, per Fry, J. See *Parker* v. *Lechmere* (1879), 12 Ch. D. 256.

(*u*) *Ante*, p. 458.

(*x*) *Smart* v. *Tranter* (1890), 43 Ch. D. 587; *Re Atkinson*, [1899] 2 Ch. 1.

(*y*) *Purdew* v. *Jackson* (1824), 1 Russ. 1, 54, 57; 25 R. R. 5.

i.e., if it should fall into possession before his death. If the husband died while the chose in action was still reversionary, the assignee could take nothing, for all he obtained by the assignment was the qualified and contingent right of his assignor (*y*).

If the wife died while the chose in action was still reversionary, the husband would as her administrator take subject to any previous assignment made by him, and therefore it would belong to the assignee, subject, however, to payment of the wife's debts (*z*).

Wife's "equity to a settlement."

In certain cases where the wife's chose in action was *equitable*, and not legal, she was entitled to her "equity to a settlement," that is, she could obtain an order from a Court of equity that the whole or part of the property should be settled upon her and her children, instead of being taken by her husband or his assignee (*a*). Such an order was obtained either in an action brought by the husband to recover the property in a Court of equity, or in an action brought by the wife for the purpose of enforcing her equity (*a*). This right could be asserted against any assignee of the husband (*b*). There was no fixed rule, but generally one-half, though sometimes the whole, was directed to be settled (*c*).

Malins' Act.

Under the old law, as a married woman had no power of disposing of property other than property belonging to her for her separate use, and the husband's right to her reversionary choses in action was of the qualified and contingent character above described, it was not possible, even for husband and wife together, to make an absolutely effectual disposition of such choses in action; but by an Act passed in 1857, and commonly called "Malins' Act" (*d*), it was provided that every married woman

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(*y*) *Purdew* v. *Jackson* (1824), 1 Russ. 1, 54, 57; 25 R. R. 5.

(*z*) *Heard* v. *Stanford* (1736), Cases temp. Talbot, 173.

(*a*) See *Elibank* v. *Montolieu* (1801), 1 W. & T. L. C. (ed. 9) 541, and notes thereto; Vaizey on Settlements, 271.

(*b*) *Macaulay* v. *Phillips* (1798), 4 Ves. 19; *Roberts* v. *Cooper*, [1891] 2 Ch. 335.

(*c*) *Re Suggitt* (1868), 3 Ch. 215; *Roberts* v. *Cooper*, *sup.*

(*d*) 20 & 21 Vict. c. 57. See notes to *Hornsby* v. *Lee* (1816), 1 W. & T. L. C. (ed. 9) 158.

may, with the concurrence of her husband, by deed acknowledged in the manner required by the Fines and Recoveries Act (*e*), dispose of her future or reversionary interest, vested or contingent, in any personal estate to which she is entitled under any instrument made (*f*) after 1857, except her own marriage settlement, as fully and effectually as if she were a *feme sole*; and may in like manner release or extinguish any power in regard to such personal estate, and release or extinguish her equity to a settlement out of her personal property in possession under any such instrument as aforesaid; but the Act is not to extend to any reversionary interest as to which she is by the instrument creating it restrained from alienation.

The concurrence of the husband, and the separate examination, were not necessary in respect of property to which the Married Women's Property Act, 1882, applied (*g*).

Chattels real.

It is not strictly within the scope of the present treatise to deal with chattel interests in land; but it may be convenient here to note that, at common law (*h*), legal terms of years belonging to the wife, become, on the marriage, the property of the husband *sub modo* and not absolutely. He becomes possessed of them in her right (*h*), and entitled to the rents and profits of them during the coverture. The marriage did not divest the term out of the wife, but the husband could dispose of it *inter vivos*, though not by his will (*i*), and if he survived his wife he was entitled to it absolutely *jure mariti*, without taking out administration to her (*k*);

(*e*) 3 & 4 Will. 4, c. 74. Acknowledgment of deeds by married women is dispensed with in the case of all deeds executed after January 1, 1926 (Law of Property Act, 1925, s. 167).

(*f*) *Roberts* v. *Cooper*, [1891] 2 Ch. 335; *Re Elcom*, [1894] 1 Ch. 303.

(*g*) See *Riddell* v. *Errington* (1884), 26 Ch. D. 220; *Re Batt*, [1897] 2 Ch. 65.

(*h*) Co. Litt. 300 a.

(*i*) *Bracebridge* v. *Cook* (1572), Plowd. 418.

(*k*) *Re Bellamy* (1884), 25 Ch. D. 620; *Surman* v. *Wharton*, [1891] 1 Q. B. 491.

but if the wife survived the husband, she was entitled to it, subject to any disposition made by the husband *inter vivos*. The husband's rights extended to reversionary interests of the wife in leaseholds for years (*l*), unless they were of such a nature that they could not possibly vest in possession until after the husband's death (*m*).

Equitable separate estate.

(2.) Equitable separate estate of a married woman must be distinguished from separate estate which is made such under statutory provisions (*n*).

In equity a married woman has ever since the reign of Elizabeth (*o*) been considered as capable of possessing property to her separate use, independently of her husband; such property is called her separate estate, and, in respect of it, she is considered as a *feme sole*. It may be acquired either by contract with the husband before marriage, or by gift from him, or from any stranger, wholly independent of such contract; so far as his legal rights as husband may interfere, the Court will treat him as a trustee for the wife (*p*).

The legal estate in the wife's separate property being vested in a trustee or trustees, she cannot convey any legal interest in it; but so far as her equitable beneficial interest is concerned, she has the same power of disposition, whether *inter vivos* or by will, as if she were unmarried (*q*). The separate use operates as a protection to a married woman against the legal power over the wife's property which is vested in the husband. "It acts in contravention and control of the legal right of the husband, and as against his legal power it is a sufficient protection; but, the power of alienation remaining in the

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(*l*) *Re Bellamy*, *ubi sup.*

(*m*) *Duberley* v. *Day* (1852), 16 Beav. 33.

(*n*) *Post*, p. 492.

(*o*) *Sanky* v. *Golding* (1560), Cary, 124. See the early cases cited in Kenny on Married Women, pp. 99 *et seq*. As to separate property generally, see Vaizey on Settlements, Chap. X.

(*p*) Per Ld. Langdale, M.R., *Tullett* v. *Armstrong* (1838), 1 Beav. 1, 21; 49 R. R. 280. As to the husband being a trustee, see per James, L.J., *Ashworth* v. *Outram* (1877), 5 Ch. D. 941; *Ex p. Sibeth*, 14 Q. B. D. 417; *Wassell* v. *Leggatt*, [1896] 1 Ch. 554. As to gifts by husband to wife; see *ante*, p. 112.

(*q*) *Fettiplace* v. *Gorges* (1789), 1 Ves. jun. 46; 1 R. R. 79.

wife, the separate estate, unfettered, is no protection against the moral influence of the husband; and many instances have occurred, and daily occur, in which the wife, under the persuasion or influence of her husband, has been, and is, induced to exercise her power of alienation in his favour, or for his benefit, and thus defeat the protection intended for her" (*r*). As a consequence it became usual to introduce into wills and settlements a clause directing that the separate estate should be incapable of assignment in anticipation, or of alienation; and the validity of this restraint on anticipation has long been allowed (*s*). But a restraint on anticipation can only be imposed in respect of separate estate (*t*), though it is sufficient if the separate use arises only by virtue of the Married Women's Property Acts (*u*).

Restraint on anticipation.

Separate estate, as its name implies, has its existence only during a coverture, *i.e.*, so long as the owner of it is a married woman (*x*); but, unless the trust for separate use is limited to the duration of a specified marriage (*y*), the separate use will again arise on a subsequent marriage (*z*); and the restraint on anticipation, being only an incident of the separate estate, ceases with the determination of the coverture but attaches again on a subsequent marriage (*z*). Therefore, after the death of the husband or dissolution of the marriage, the wife (so long as she remains unmarried) can dispose of property

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(*r*) Per Ld. Langdale, M.R., *Tullett* v. *Armstrong* (1838), 1 Beav. 1, 22; 49 R. R. 280. As to gifts by wife to husband, see Vaizey on Settlements, 783 *et seq.*

(*s*) *Ib.* See, further, as to separate estate, Ashburner on Equity, pp. 231-242; per Ld. Selborne, C., *Cahill* v. *Cahill* (1883), 8 App. Cas. 426; *Taylor* v. *Meads* (1865), 4 De G. J. & S. 597, 603; and as to restraint on anticipation, Ashburner, pp. 242-4; Theobald on Wills, (ed. 8), 725 *et seq.*; *Butler* v. *Butler* (1886), 16 Q. B. D. 377. As to the history of the "restraint on anticipation," see Kenny on Married Women, 104.

(*t*) *Stogdon* v. *Lee*, [1891] 1 Q. B. 661.

(*u*) *Re Lumley*, [1891] 2 Ch. 690.

(*x*) *Tullett* v. *Armstrong*, *sup.*

(*y*) *Ib.* p. 27; *Hawkes* v. *Hubback* (1871), 11 Eq. 5; *Hamilton* v. *Hamilton*, [1892] 1 Ch. 396; *Stroud* v. *Edwards* (1898), 77 L. T. 280.

(*z*) *Tullett* v. *Armstrong* (1838), 1 Beav. 1; 4 My. & Cr. 390; 49 R. R. 280.

which during the marriage was her equitable separate property subject to a restraint on anticipation (*a*). And where property is given to a spinster subject to a restraint on anticipation in the event of her marriage, she may, while still unmarried, deal with the whole or any part of it so as to make it free from the restraint (*b*).

The restraint on anticipation does not apply to income which has accrued due to a married woman, though such income has not come to her hands, but is in the hands of her trustees (*c*); but when a judgment has been obtained against her, income which has accrued due after the date of the judgment cannot be attached to satisfy the judgment (*d*).

A married woman cannot by any estoppel from her acts, conduct, or admissions, or even by her own fraud, be deprived of the protection afforded by a restraint on anticipation (*e*).

Removal of restraint in certain cases.

The Law of Property Act, 1925, provides that, where a married woman is restrained from anticipation, the Court may, with her consent, by judgment or order bind her interest in any property if it appears to the Court to be for her benefit to do so (*f*). The Married Women's Property Act, 1893, enables the Court, before which any action or proceeding instituted by a woman is pending, to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and to enforce such order by the appointment of a receiver and the sale of the property (*g*).

And by the Trustee Act, 1925, where a trustee commits a breach of trust at the instigation or request

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(*a*) *Wright* v. *Wright* (1862), 2 J. & H. 647.

(*b*) *Re Chrimes*, [1917] 1 Ch. 30.

(*c*) *Hood-Barrs* v. *Heriot*, [1896] A. C. 174.

(*d*) *Bolitho* v. *Gidley*, [1905] A. C. 98.

(*e*) *Bateman* v. *Faber*, [1898] 1 Ch. 144.

(*f*) S. 169, replacing s. 7 of the Conveyancing Act, 1911, which enlarges the scope of and repeals s. 39 of the Act of 1881. See *Re Pollard*, [1896] 2 Ch. 552; *Re Blundell*, [1901] 2 Ch. 221.

(*g*) 56 & 57 Vict. c. 63, s. 2. *Hood-Barrs* v. *Heriot*, [1897] A. C. 177; *Hood-Barrs* v. *Cathcart* (*No.* 4), [1895] 1 Q. B. 873; *Nunn* v. *Tyson*, [1901] 2 K. B. 487; *Dresel* v. *Ellis*, [1905] 1 K. B. 574.

or with the consent in writing of a beneficiary, the Court may, in its discretion, impound the interest, or any part thereof, of the beneficiary in the trust property, notwithstanding that such beneficiary may be a married woman restrained from anticipation, by way of indemnity to the trustee or persons claiming under him (*h*).

Devolution of separate estate.

The quality of separate property ceases on the death of the married woman, and thereupon, in the absence of express provision to the contrary, her separate property (so far as she has not disposed of it by will or otherwise) devolves, and the right of her husband surviving her accrues, just as if the separate use had never existed (*i*). But in the case of death of the wife intestate on or after January 1, 1926, the husband will in no case succeed to personalty *jure mariti* (*k*).

Separate use—how created.

No particular form of words is required to create the separate use. Any expression from which an intention to exclude the husband can be clearly inferred will be sufficient for that purpose; but the intention to give a separate estate must be clearly expressed (*l*). The words must show an intention to secure the property against the control of the husband and to give to the wife the sole and absolute disposition (*m*).

The usual origin of separate estate is an ante-nuptial settlement, or a gift or limitation to her separate use in some other written instrument *inter vivos*, or a bequest by will; but such separate estate may arise in other ways, as, for example, where her husband agrees after the marriage that she shall carry on a trade or business on her separate account; and such agreement may be express, or implied from conduct on the part of the

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(*h*) S. 62, replacing s. 45 of Trustee Act, 1893.

(*i*) Per Stirling, J., *Re Lambert* (1888), 39 Ch. D. 633; *Cooper* v. *Macdonald* (1878), 7 Ch. D. 296. See *ante*, p. 458.

(*k*) Administration of Estates Act, 1925, s. 45 (1) (a).

(*l*) See Elph. N. & C. Interp., Rule 117, p. 296, and instances there cited, and in the notes to *Hulme* v. *Tenant* (1778), 1 W. & T. L. C. (ed. 9) 561 *et seq.*; Theobald on Wills (ed. 8) 723; Vaizey on Settlements, 754.

(*m*) *Massy* v. *Rowen* (1869), L. R. 4 H. L. 288. See *Surman* v. *Wharton*, [1891] 1 Q. B. 491.

husband showing that he had made himself a trustee for the wife (*n*). And separate property might arise where a wife was deserted by her husband (*o*), or judicially separated (*p*).

Lord Langdale, M.R. (*q*), expressed the result of the authorities in the following propositions :—

> "Property given to a woman for her separate use, independent of any husband, may be enjoyed by her during her coverture as her separate estate, although the property originally, or at any subsequent period or periods of time, became vested in her when discovert. In respect of such separate estate she is considered as a *feme sole*, although covert. Her faculties as such and the nature and extent of them are to be collected from the terms in which the gift is made to her and will be supported by the Court for her protection."
>
> "The words 'independent of a husband,' whether expressed or implied in the terms of the gift, mean no more than that the Court will not permit the marital power of the husband to be used in contravention of the enjoyment of the property according to the terms of the gift."
>
> "If the gift be made for her sole and separate use, without more, she has during the coverture an alienable estate independent of her husband."
>
> "If the gift be made for her sole and separate use without power to alienate, she has during the coverture the present enjoyment of an unalienable estate, independent of her husband."
>
> "In either of these cases she has, when discovert, a power of alienation; the restraint is annexed to the separate estate only, and the separate estate has its existence only during coverture; while the woman is discovert, the separate estate, whether modified by restraint or not, is suspended and has no operation, though it is capable of arising on the happening of a marriage. . . . The separate estate may and often does exist without the restriction, but the restriction has no independent existence; when found, it is as a modification of the separate estate and inseparable from it."

Statutory separate property—Married Women's Property Act, 1870.

(3.) Thirdly, we have to discuss the proprietary rights conferred on married women by statute.

The Married Women's Property Act, 1870 (*r*), as

(*n*) See the cases of *Ashworth* v. *Outram* (1877), 5 Ch. D. 923; *Lovell* v. *Newton* (1879), 4 C. P. D. 7; and *Re Dearmer* (1886), 53 L. T. 905.

(*o*) *Cecil* v. *Juxon* (1738), 1 Atk. 278.

(*p*) *Rudge* v. *Weedon* (1859), 4 De G. & J. 216.

(*q*) *Tullett* v. *Armstrong* (1838), 1 Beav. 1, 32; 49 R. R. 280.

(*r*) 33 & 34 Vict. c. 93.

amended by the Act of 1874 (*s*), gave to every married woman (whenever married) as her separate property, when acquired after August 9, 1870, all separate earnings (*t*), deposits in savings banks made in her own name, and all government annuities, public stocks or funds, shares, debentures, or stock of any company or society entered in her own name; also (in cases of women married after 1870) all personal property devolving on her as next of kin of an intestate, and any sum not exceeding £200 coming to her under any deed or will (*u*), and the rents and profits of real estate descending to her as heiress. The Act also enabled a married woman to insure her own or her husband's life, for her separate use (*x*).

Married Women's Property Act, 1882.

The Acts of 1870 and 1874 were repealed by the Married Women's Property Act, 1882 (*y*), which made very sweeping changes in the proprietary relations of husband and wife, and to a very large extent abrogated the old common law rules. It is necessary to observe that separate property to which a married woman is entitled under this Act is her property at law, and the legal interest is vested in her and not in trustees in trust for her, as is the case with the equitable separate estate which we discussed above. The provisions of the Act, it has been said, " seem to be intended to give her at law a right to any property acquired after the commencement of the Act, equivalent to the separate use, which was a creation of equity. In the creation of that separate use a trust was required; and, as a trust never fails for want of a trustee, where no other trustee was appointed, it was held that the husband should be considered as trustee for the wife. This new interest is to be without any trust, a legal interest " (*z*).

It will be seen that the Act gives proprietary rights,

(*s*) 37 & 38 Vict. c. 50.
(*t*) See *Ashworth* v. *Outram* (1877), 5 Ch. D. 923.
(*u*) *Re Voss* (1880), 13 Ch. D. 504; *Re Davies*, [1897] 2 Ch. 204.
(*x*) *Johnson* v. *Johnson* (1887), 35 Ch. D. 345.
(*y*) 45 & 46 Vict. c. 75, s. 22.
(*z*) Per Kay, J., *Re Jupp* (1888), 39 Ch. D. 152.

not only to all women married after 1882, but also to women married before 1883, so far as regards property acquired by them after 1882.

Capacity to acquire, hold, and dispose of property.

By the Act of 1882 (*a*), as amended by the Acts of 1893 (*b*) and 1907 (*c*), a married woman is, in accordance with the provisions of the Act (*d*), capable of acquiring, holding, and disposing of by will or otherwise, any real or personal property as her separate property in the same manner as if she were a *feme sole*, without the intervention of any trustee (*e*).

Women married *after* 1882.

A woman married *after* the commencement of the Act is entitled to have, hold, and dispose of as her separate property, all real and personal property, belonging to her at the time of marriage, or acquired by or devolving on her after marriage, including all earnings, money, and property gained or acquired by her in a separate trade or occupation (*f*).

Women married *before* 1883.

A woman married *before* the commencement of the Act is entitled to have, hold, and dispose of as her separate property all real and personal property her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, accrues *after* the commencement of the Act, including all earnings, money, and property gained or acquired by her separately from her husband (*g*).

It was held that sect. 1 did not give any disposing power as to property not falling within sects. 2 and 5, and that, therefore, the will of a married woman would not operate on property acquired by her before the Act or after coverture unless re-published (*h*); but this has been altered by the Act of 1893 (*i*).

(*a*) 45 & 46 Vict. c. 75.

(*b*) 56 & 57 Vict. c. 63.

(*c*) 7 Edw. 7, c. 18.

(*d*) See *Re Cuno* (1890), 43 Ch. D. 12; *Re Wimperis*, [1914] 1 Ch. 502.

(*e*) Act of 1882, s. 1 (1).

(*f*) *Ib.* s. 2.

(*g*) *Ib.* s. 5.

(*h*) *Re Cuno, sup.*; *Re Price* (1885), 28 Ch. D. 709.

(*i*) 56 & 57 Vict. c. 63, s. 3. *Ante*, p. 493.

Accrual of title.

If a woman married before the commencement of the Act has, before that time, acquired a title, whether vested or contingent, in reversion or remainder, to any property, that property does not become her separate property by sect. 5, though it falls into possession after the Act (*k*).

Settlements, or restraint on anticipation, not affected.

The provisions of sects. 2 and 5 of the Act of 1882 must be read in connection with those of sect. 19, which provide that nothing in the Act shall interfere with or affect any settlement, whether ante-nuptial or post-nuptial, respecting the property of a married woman, or any restraint on anticipation (*l*). A restraint on anticipation in any settlement by a woman of her own property is not, however, valid against any debts contracted by her before marriage, and a settlement has no greater validity against the creditors of such woman than a like settlement by a man would have (*m*).

Therefore, in the case of property belonging to or coming to a married woman which would be bound by the terms of a settlement, she is not by the Act enabled to dispose of such property without regard to the settlement (*n*). Thus, in *Stevens* v. *Trevor-Garrick* (*o*), a lady, who was an infant at the time of her marriage in 1890, had joined with her husband in assigning a sum of £1,000, to which she had become entitled, to the trustees of her marriage settlement. She sought to repudiate the settlement (which was not made under the Infants' Settlements Act, 1855 (*p*)), on attaining her majority, but it was held that sect. 19 of the Act of 1882 prevented the application of sect. 2 to the property

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(*k*) *Reid* v. *Reid* (1886), 31 Ch. D. 402; *Re Parsons* (1890), 45 Ch. D. 51; *Re Bacon*, [1907] 1 Ch. 475.

(*l*) 45 & 46 Vict. c. 75, s. 19, as amended by s. 2 of the Act of 1907. See *Re Wheeler*, [1899] 2 Ch. 717; *Birmingham Soc.* v. *Lane*, [1903] 1 K. B. 35.

(*m*) 45 & 46 Vict. c. 75, s. 19. See *Re Wheeler*, [1899] 2 Ch. 717; *Rothschild* v. *Fisher*, [1920] 2 K. B. 243.

(*n*) *Re Whitaker* (1887), 34 Ch. D. 227; *Hancock* v. *Hancock* (1888), 38 Ch. D. 78; *Stevens* v. *Trevor-Garrick*, [1893] 2 Ch. 307; *Buckland* v. *Buckland*, [1900] 2 Ch. 534.

(*o*) *Ubi sup.*

(*p*) *Post*, p. 499.

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in question and that the husband's assignment made the settlement binding as it would have done previously to the Act. In *Buckland* v. *Buckland* (*q*) a similar decision was given in a case where the husband had agreed to settle property belonging to the intended wife, who was an infant at the time of the marriage. The Married Women's Property Act, 1907, however, now provides that a settlement or agreement for a settlement, made after January 1, 1908, by the husband or intended husband, whether before or after marriage, respecting the property of any woman he may marry or have married, shall not be valid (except to the extent of any interest he takes in the property in case of her death before attaining majority) unless it is executed by her if she is of full age, or confirmed by her after she attains full age (*r*).

Investments.

All deposits in savings banks or other banks, annuities, public stocks or funds, stocks, shares, or debentures of or in any corporation, company, or society standing in the name of a married woman at the commencement of the Act (*s*), or afterwards placed in her sole name (*t*), are deemed to be her separate property until the contrary is shown. As to such property afterwards placed in her name, her separate estate is alone liable in respect of any liability incident to such property (*t*).

Where any of the above property is invested in the name of a married woman jointly with a person other than her husband, the provisions of sects. 6 and 7 apply thereto so far as relates to "the estate, right, title, or interest" of the married woman (*u*).

A married woman can deal with any such property standing in her sole name or in her name jointly with a person other than her husband without the concurrence of her husband (*x*).

(*q*) *Ubi sup.*

(*r*) 7 Ed. 7, c. 18, s. 2.

(*s*) Act of 1882, s. 6.

(*t*) S. 7.

(*u*) S. 8.

(*x*) S. 9.

If a married woman makes any such investment out of moneys of her husband without his consent, he can recover such investment (*y*).

A married woman may effect a policy of insurance upon her own or her husband's life for her separate use (*z*).

Remedies of married woman for protection of separate property.

Every woman, whether married before or after the Act, is to have in her own name against all persons, including her husband, the same civil remedies, and also (subject, as regards her husband, to certain restrictions where they are living together, and in respect of acts done by him while they were living together) the same remedies and redress by way of criminal proceedings, for the protection, security, and recovery of her own separate property, as if such property belonged to her as a *feme sole* (*a*).

The Act of 1882 does not affect the devolution of a wife's separate estate on her death so far as she has not exercised her power of disposing of it by will, and as to such undisposed-of property the rights of her husband remain (*b*), but in the case of the wife's death after January 1, 1926, he will no longer take *jure mariti* (*c*).

Gift to husband and wife and third person.

It was a consequence of the doctrine that husband and wife are (for most purposes) one person in law that, if property were conveyed or bequeathed to a husband and his wife and third persons, the husband and wife took only one share as their joint property; for instance, where a legacy was given to A., his wife and children, and there were two children, each child took one-third, and A. and his wife one-third between them (*d*). The interest taken by a husband and wife was called a "tenancy by entireties."

(*y*) S. 10.

(*z*) S. 11. See *Griffiths* v. *Fleming*, [1909] 1 K. B. 805. See also *ante*, p. 238.

(*a*) S. 12; *Larner* v. *Larner*, [1905] 2 K. B. 539.

(*b*) See *Re Lambert* (1888), 39 Ch. D. 626, *ante*, p. 491; and as to the operation of the will of a married woman, *ante*, pp. 493-4.

(*c*) Administration of Estates Act, 1925, s. 45 (1) (a).

(*d*) *Gordon* v. *Whieldon* (1848), 11 Beav. 170.

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The Act of 1882 did not alter any rights except those of the husband and wife *inter se*, and therefore did not alter the above rule so far as regards the rights of the third persons. The effect of the Act was that the husband and wife took one share between them, but the wife took one-half of that share as her separate property according to the Act (*e*). The Law of Property Act, 1925, now provides that, under a disposition made or coming into operation after January 1, 1926, a husband and wife shall, for all purposes of acquisition of any interest in property, be treated as two persons (*f*).

§ 2. *Infants.*

Coke says (*g*) that an infant cannot bind himself by any deed, or alien any land, goods, or chattels. The true doctrine seems to be that any instrument executed or act done by an infant which is necessarily prejudicial to him is void as against him; but that, if it may be for his benefit, it is voidable only, and stands good unless he elects within a reasonable time after coming of age to avoid it (*h*); and this is so, although the infant who has come of age is a married woman (*i*).

Necessaries.

There are some apparent exceptions to the above rule, for an infant is by a quasi-contractual obligation bound to pay a reasonable price for necessaries supplied to him (*k*), and is bound by the terms of a contract of apprenticeship or service entered into by him (*l*), unless it is an unfair contract which is not to his advantage (*l*).

Contract of service.

(*e*) *Re March* (1884), 27 Ch. D. 166; *Re Jupp* (1888), 39 Ch. D. 148. Cp. *Re Dixon* (1889), 42 Ch. D. 306.

(*f*) S. 37.

(*g*) Co. Litt. 171 b.

(*h*) 1 Roll. Abr. 728; Co. Litt. 2 b; Shep. Touch. 232; *Burnaby* v. *Equitable Reversionary Soc.* (1885), 28 Ch. D. 416; *Edwards* v. *Carter*, [1893] A. C. 360; *Stephens* v. *Dudbridge Co.*, [1904] 2 K. B. 225.

(*i*) *Re Hodson*, [1894] 2 Ch. 421.

(*k*) See Sale of Goods Act, 1893, s. 2; *Re Clabbon*, [1904] 2 Ch. 465.

(*l*) *Corn* v. *Mathews*, [1893] 1 Q. B. 310; *Clements* v. *L. & N. W. R. Co.*, [1894] 2 Q. B. 482; *Leng* v. *Andrews*, [1909] 1 Ch. 763; *Bromley* v. *Smith*, [1909] 2 K. B. 235; *Gadd* v. *Thompson*, [1911] 1 K. B. 304; *Roberts* v. *Gray*, [1913] 1 K. B. 520.

Bill of exchange.

An infant cannot make himself liable on a bill of exchange or promissory note (*m*), even if it is given to pay for necessaries supplied (*m*).

Money paid by infant.

If, at the time of repudiation, the infant has derived no benefit from the contract, he can recover back anything he has paid or given under it, but not if he has received valuable consideration and the *status quo ante* cannot be restored (*n*).

Infants' Relief Act, 1874.

The Infants' Relief Act, 1874, provides that all contracts, whether by specialty or simple contract, entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied, other than contracts for necessaries, and all accounts stated with infants, shall be absolutely void; but this provision does not invalidate any contract into which an infant may, by any statute or by the rules of common law or equity, enter, except such as are by law avoidable (*o*).

It has been held that delivery of goods in pursuance of a contract void under the Act of 1874, with the intention of transferring the property in the goods, will vest the property in the goods in the infant and a sale of the goods by him will not amount to a tortious conversion (*p*).

The Act further provides that no action shall be brought to charge any person upon a promise made after full age to pay a debt contracted during infancy, or on any ratification made after full age of a promise or contract made during infancy, whether there is or is not any consideration for such promise or ratification (*q*).

By the Infants' Settlements Act, 1855 (*r*), a male infant not under twenty years of age, and a female infant

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(*m*) *Re Soltykoff*, [1891] 1 Q. B. 413.

(*n*) *Steinberg* v. *Scala, Ltd.* (1923), 2 Ch. 452; *Hamilton* v. *Vaughan-Sherrin Co.*, [1894] 3 Ch. 589; *Valentini* v. *Canali* (1890), 24 Q. B. D. 166; *Pearce* v. *Brain* (1929), 45 T. L. R. 501.

(*o*) 37 & 38 Vict. c. 62, s. 1. See *Valentini* v. *Canali*, *sup.*; *Nottingham Soc.* v. *Thurstan*, [1903] A. C. 6; *Cowern* v. *Nield*, [1912] 2 K. B. 419; *Leslie, Lim.* v. *Sheill*, [1914] 3 K. B. 607.

(*p*) *Stocks* v. *Wilson*, [1913] 2 K. B. 235.

(*q*) *Ib.* s. 2. See *Ditcham* v. *Worrall* (1880), 5 C. P. D. 410; *Smith* v. *King*, [1892] 2 Q. B. 543.

(*r*) 18 & 19 Vict. c. 43.

Infants' Settlements Act.

not under seventeen years of age, may with the approbation of the Court make a binding settlement on marriage of his or her real or personal estate, whether in possession, reversion, remainder, or expectancy (*s*). It has been held (*t*) that the Act removes the disability of infancy only, leaving unaffected the disability of coverture; and therefore a settlement by an infant married woman made after the marriage with the approval of the Court was ineffectual as to a reversionary chose in action (not within Malins' Act) (*u*).

The Act gives no jurisdiction to the Court to compel an infant to make a settlement (*x*).

§ 3. *Persons of unsound mind.*

Voluntary conveyances, &c.

Acts of a lunatic or person of unsound mind which are merely voluntary, *i.e.*, where there has been a dealing by the lunatic with his own property without any consideration passing from others, are void (*y*). But transactions for value are not void, but voidable only; and they are not even voidable where the lunatic's state of mind was unknown to the other party and no advantage was taken of the lunatic (*z*). "The result of the authorities," said Lord Cranworth (*a*), "seems to be that dealings of sale and purchase by a person apparently sane, though subsequently found to be insane, will not be set aside against those who have dealt with him on the faith of his being a person of competent understanding."

"When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is

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(*s*) Property "in expectancy" includes after-acquired property: *Moore* v. *Johnson*, [1891] 3 Ch. 48.

(*t*) *Seaton* v. *Seaton* (1888), 13 App. Cas. 61. The Act applies to a post-nuptial settlement, *Re A. B.*, [1914] W. N. 140. See *Re Sampson* (1884), 25 Ch. D. 482; *Re Phillips* (1887), 34 Ch. D. 467.

(*u*) *Ante*, p. 486.

(*x*) *Re Leigh* (1889), 40 Ch. D. 290.

(*y*) *Elliot* v. *Ince* (1857), 7 De G. M. & G. 475, 487.

(*z*) *Molton* v. *Camroux* (1848), 2 Ex. 487; 4 Ex. 17; *Matthews* v. *Baxter* (1873), L. R. 8 Ex. 132.

(*a*) *Elliot* v. *Ince*, *sup.*, at p. 488.

binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about" (*b*).

By the Lunacy Acts, 1890-1922 (*c*), replacing former enactments, provision is made for the management of the property of persons of unsound mind by means of "committees," and under the superintendence of the judge in lunacy (*d*). The Mental Deficiency Acts, 1913-1927, make similar provision in the case of "defectives" (*e*). Under the Law of Property Act, 1925, the Court is given power to direct the settlement of the beneficial interests of lunatics and defectives on such trusts as it considers expedient (*f*).

§ 4. *Aliens.*

A friendly alien is under no incapacity by common law as to contracting or as to chattels personal (*g*); but by statute (*h*) he is disqualified from being the owner of a British ship or any share therein.

The Companies (Foreign Interests) Act, 1917 (*i*), contains provisions designed to prevent aliens obtaining control of the business of incorporated companies where such control might be contrary to the public interests.

By the British Nationality and Status of Aliens Act, 1914 (*k*), "real and personal property of every description (except a British ship or any share therein) may be

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(*b*) *Imperial Loan Co.* v. *Stone*, [1892] 1 Q. B. 599, 601, per Ld. Esher, M.R.

(*c*) 53 Vict. c. 5; 54 & 55 Vict. c. 65; 8 Edw. 7, c. 47; 1 & 2 Geo. 5, c. 40; 12 & 13 Geo. 5, c. 60. See Pope's Law and Practice in Lunacy.

(*d*) S. 108 of the Act of 1890.

(*e*) Mental Deficiency Act, 1913, s. 64. For definitions of different classes of defectives, see Mental Deficiency Act, 1927, s. 1.

(*f*) S. 171.

(*g*) Co. Litt. 129 b; *Watford* v. *Marsham* (1596), Moo. 431.

(*h*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 1; British Nationality and Status of Aliens Act, 1914, s. 17. *Ante*, p. 136.

(*i*) 7 & 8 Geo. 5, c. 18.

(*k*) S. 17.

MIDDLE TEMPLE LIBR

taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject."

An alien enemy (*l*) has no remedy on his contracts during the continuance of the war; but when peace is restored he can sue in our courts (*m*). If, however, he has licence from the Crown to trade, or is residing in the United Kingdom by licence from the Crown, he can sue during the continuance of the war (*n*). A British subject, or the subject of a neutral State, trading in (*o*), or permanently (*p*) residing in an enemy's country, is under the disability of an alien enemy. The test of enemy status is not nationality but the place where a person resides or carries on business (*q*).

Natural-born British subjects.

"Natural-born British subjects" include the following:—

(1) At common law. A child born within the legiance of the King (*r*), or, in other words, within the British dominions, not being a child whose father is an alien enemy and who is born in a place in hostile occupation; or a child born to an English ambassador in the country to which he is accredited (*s*); but not a child born in foreign parts to an officer in the military service of the Crown there (*t*).

(2) By statute (*tt*). A child born out of the British dominions whose father was a British subject

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(*l*) The Court will take judicial notice of the existence of a war; *Alcinous* v. *Nigreu* (1854), 4 E. & B. 217.

(*m*) *Alcinous* v. *Nigreu*, *sup.*; *Flindt* v. *Waters* (1812), 15 East, 260; 13 R. R. 457; *Cantiare San Rocco Co.* v. *Clyde Shipbuilding Co.*, [1924] A. C. 226. See McNair, Legal Effects of War.

(*n*) *Wells* v. *Williams* (1697), 1 Ld. Raym. 282; *Usparicha* v. *Noble* (1811), 13 East, 332; 12 R. R. 360; *Porter* v. *Freudenberg*, [1915] 1 K. B. 857.

(*o*) *Albrecht* v. *Sussmann* (1813), 2 V. & B. 322; 13 R. R. 110.

(*p*) *Roberts* v. *Hardy* (1815), 3 M. & S. 533; 16 R. R. 347.

(*q*) *Porter* v. *Freudenberg*, *sup.*

(*r*) 1 Co. Litt. 129 a.

(*s*) *Aeneas Macdonald's Case* (1745), 18 State Trials, 857; *Calvin's Case* (1608), 7 Rep. 18 a; *Bacon* v. *Bacon* (1641), Cro. Car. 601.

(*t*) *De Geer* v. *Stone* (1883), 22 Ch. D. 243. Under the Act of 1914, s. 1 (1) (b), he would now be a natural-born British subject.

(*tt*) British Nationality and Status of Aliens Acts, 1914 to 1922.

at the time of the birth, and was born within the British dominions, or had been naturalized, or had become a British subject by reason of annexation of territory, or was at the time of the birth in the service of the Crown (*u*).

British Nationality Act, 1914.

A married woman is a subject of the State of which her husband is for the time being a subject (*x*); but where the husband ceases during the continuance of the marriage to be a British subject, the wife may, by making a declaration for that purpose, retain her British nationality (*y*). A widow, if she is a natural-born British subject and has become an alien, may obtain a certificate of re-admission to British nationality without complying with the conditions of residence necessary for naturalization in ordinary cases (*z*). Where the father, or the mother (being a widow), being a British subject becomes an alien, the children who during infancy have become resident in the country where the parent is naturalized and have become naturalized there are not British subjects (*a*), but any child who has so ceased to be a British subject may, within one year after attaining his majority, make a declaration that he wishes to resume British nationality, and shall thereupon again become a British subject (*b*). Where a widow, who is a British subject, marries an alien, any child of hers by her former husband, does not, by reason only of the marriage, cease to be a British subject (*c*). Where an alien obtains a certificate of naturalization, there may, on his application, be included in the certificate the name of any child born to him before the date of the certificate and being a minor, and that child shall thereupon become a British subject (if not already so); but any such child may, within one year of attaining his majority, make a declaration of alienage, and shall then cease to be a British subject (*d*).

(*u*) Act of 1914, s. 1 (1) (b).

(*x*) Ss. 10, 11.

(*y*) S. 10.

(*z*) S. 2 (5).

(*a*) S. 12 (1).

(*b*) S. 12 (2).

(*c*) S. 12 (1).

(*d*) S. 5 (1).

Naturalization.

Naturalization, whereby an alien becomes a British subject, is obtained either by a special Act of Parliament or by a certificate under the British Nationality Act, 1914 (*e*).

(*e*) This Act, as amended by the Acts of 1918 and 1922, repeals the Naturalization Act, 1870, and consolidates the law relating to British nationality.

FORMS IN APPENDIX.

CHARTERPARTY.
BILL OF LADING.
POLICY OF MARINE ASSURANCE.
LETTERS PATENT.
BILL OF SALE.

APPENDIX.

FORMS.

CHARTERPARTY (*a*).

(Chamber of Shipping Welsh Coal Charter.)

19 .

Forms.

It is this day mutually agreed between
Owners of the good Steamship called the classed
of tons net register tons dead-
weight, exclusive of bunkers, or thereabouts,
Master, now , and expected ready
to load about AND
as Agents for the Charterers.

1. That the said Vessel being tight, staunch and strong, and in every way fitted for the Voyage, shall with all possible dispatch sail and proceed to and there load always afloat, in the customary manner, from the Charterers, in such Dock as may be ordered by them on or before arrival in Roads a full and complete Cargo of Coal not exceeding tons, nor less than tons, and not exceeding what she can reasonably stow and carry, over and above her Tackle, Apparel, Provisions, and Furniture; and being so loaded, shall therewith proceed, with all possible dispatch, to or so near thereunto as she can safely get, and there deliver her cargo alongside any Wharf, and/or Vessel, and/or Craft, as ordered, where she can safely deliver, always afloat, but if required to shift, the expense of so doing to be paid by Consignees, and the time to count; on being paid Freight at the rate of per ton of 20 cwts., or 1,015 kilos delivered, or on Bill of Lading quantity less two per cent., at Receiver's option, to be declared in writing before bulk is broken. If the Receiver should elect to weigh the cargo at the port of destination the weighing shall be done (by an official weigher) at his expense. The Owners

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(*a*) *Ante*, p. 142.

Forms.

may provide a check weigher at Vessel's expense. Should any deficiency be alleged on the authority of such weighing, it shall affect the freight only, from which no deduction shall be made for alleged shortage of Cargo, any custom of the port of discharge notwithstanding, the Owners being only liable to deliver, subject as herein provided, such cargo as they receive on board, but the Owners shall furnish, if required, a Statutory declaration by the Master and other officers that all the Cargo received on board has been delivered. The freight is in full of Trimming, and of all Port Charges, Pilotages, and Consulages on the Vessel. All Wharfage dues on the Cargo to be paid by the Charterers.

2. A sailing telegram to be sent to the Charterers on Vessel leaving her last port, or in default twenty-four hours more to be allowed for loading.

3. The Cargo to be loaded in   running hours (excluding Bunkering time, Sundays, Custom House, Colliery, and Local Holidays, Easter Monday and Tuesday, Whit Monday and Tuesday, and three days following Christmas Day, and from 5 p.m. on Saturday or the day previous to any such holiday to 7 a.m. on Monday or the day after any such holiday unless used) commencing when written notice is given of Vessel being completely discharged of inward cargo and ballast in all her holds and ready to load, such notice to be given between the business hours of 9 a.m. and 5 p.m. or 1 p.m. on Saturdays.

If detained longer Charterers shall pay demurrage at the following rates:—For Vessels of under 1,600 tons net register 16/8 for every running hour. For Vessels of 1,600 tons net register and over, 16/8 for every running hour for the first 72 hours and thereafter (if detained longer) at the rate of $\frac{1}{8}$th of a penny per net register ton for every running hour.

Any time lost through riots, strikes, lock-outs, or any dispute between masters and men occasioning a stoppage of pitmen, trimmers, or other hands connected with the working or delivery of the coal for which the Vessel is stemmed, or by reason of accidents to mines or machinery, obstructions on the Railway or in the Docks; or by reason of floods, frosts, fogs, storms, or any cause beyond the control of the Charterers, not to be computed as part of the loading time (unless any Cargo be actually loaded during such time). In case of partial holiday or partial stoppage of Colliery or Collieries, from any or either of the aforenamed causes, the lay hours to be extended proportionately to the diminution of output arising from such partial holiday or stoppage, but no deduction of time shall be allowed for stoppages, unless due notice be given at the time to the Master or Owners.

Forms.

In the event of any stoppage or stoppages arising from any of the above causes continuing for the period of six running days from the time of the Vessel being ready to load, this Charter shall, provided, however, that no Cargo shall have been shipped on board the Vessel previous to such stoppage or stoppages, become null and void.

In the event of such stoppage or stoppages commencing after the Vessel is ready to load and continuing for six running days, then this Charter shall, at the expiration of such period, provided that no cargo shall have been shipped on board the Vessel previous to such stoppage or stoppages, become null and void.

If at the commencement of such stoppage or stoppages the Vessel is on demurrage, then provided that no Cargo has been shipped and the stoppage extends to not less than 75 per cent. of the Collieries in South Wales and Monmouthshire working steam coal (including the Colliery working the coal for which the Vessel is stemmed), the Charterers may at any time during such stoppage after the expiration of three days from the commencement thereof give three days' written notice that they are prepared to cancel this Charter and from and after the expiration of such notice no further demurrage shall be payable in respect of the time lost through such stoppage, but the Charterers shall pay demurrage up to the expiration of such notice. On receipt of such notice the Vessel may either thereupon sail or the Owners may within 24 hours of its receipt give the Charterers written notice of their intention that the Vessel shall remain until the termination of the stoppage, and in such event the Charterers shall, upon the termination of the stoppage, load the Vessel under this Charter her lay hours commencing at 7 a.m., of the day on which such Collieries generally re-start work. In the event of the Owners not giving such notice as above mentioned, then upon payment of the demurrage due to the Vessel this Charter shall become null and void.

Any question arising under this clause shall be referred to a Committee, consisting of one Shipowner, to be nominated by the Cardiff Shipowners' Association, and one Colliery owner, to be nominated by the Monmouthshire and South Wales Coal Owners' Association, and should they be unable to agree, the decision of an Umpire selected by them shall be final.

4. Bunker Coals to be kept properly separated from Cargo to Charterers' satisfaction at the Vessel's expense and the quantity to be endorsed on the Bills of Lading. If any Cargo is carried in a hold communicating directly with the Stokeholds the doors to be securely fastened on the Cargo side.

Forms.

5. The Bills of Lading shall be prepared in accordance with the Colliery, Railway, Dock or Works weight in the form endorsed on this Charter, and shall be signed by the Master, Agent, or Owners, weight shipped unknown, freight and all terms conditions and exceptions as per this Charter, such Bills of Lading to be signed at the Charterers' or Shipper's Office, within twenty-four hours after the vessel is loaded.

6. The Act of God, the King's Enemies, Restraints of Princes and Rulers, or Peoples, including interferences of Government Authorities or their officials, and Perils of the Seas shall be mutually excepted.

The Owners in all matters arising under this contract shall also be entitled to the like privileges and rights and immunities as are contained in Sections 2 and 5 of the Carriage of Goods by Sea Act, 1924, and in Article IV. of the Schedule thereto.

The Vessel shall have liberty to sail without Pilots to call at any ports in any order for bunkering or other purposes or to make trial trips after notice or adjust compasses all as part of the contract voyage.

Charterers shall not be answerable for any negligence, default, or error in judgment of Stevedores employed in discharging the Cargo.

7. The Cargo to be taken from alongside by Consignees at port of discharge, free of expense and risk to the Vessel, at the average rate of tons per day, weather permitting, Sundays and holidays excepted, provided Vessel can deliver it at this rate; if longer detained Consignees to pay Vessel demurrage at the rate of fourpence per net register ton per running day (or *pro rata* for part thereof). Time to commence when Vessel is ready to unload and written notice given, whether in berth or not. In case of strikes, lock-outs civil commotions, or any other causes or accidents beyond the control of the Consignees which prevent or delay the discharging, such time is not to count, unless the Vessel is already on demurrage. Consignees to effect the discharge of the Cargo, Vessel paying per ton of 20 cwt., or 1,015 kilos and providing only steam, steam-winches, winchmen, gins, and falls.

8. The FREIGHT to be paid if required by the Owners, on signing Bills of Lading (Ship lost or not lost), in Cash, less per cent. for Insurance and Interest (the Owners or their Agent giving Charterers or Shippers written notice before the Vessel commences loading, if any advance freight is required), and the remainder on right delivery of the Cargo, in sufficient Cash for Vessel's ordinary disbursements at current exchange, and the balance (unless otherwise arranged between the Owners and Charterers) by a good and approved

Bill on London at three months' date, or in cash equal thereto, at Captain's option. The Receivers of the Cargo to be bound to pay freight on account during delivery, if required by the Captain. The Charterers' account at port of loading to be paid when rendered, otherwise the Charterers may deduct it on settlement of freight at port of destination (together with a charge of three per cent. to cover all charges including Insurance and Interest).

9. The Vessel to be free of address at Port of Discharge, but to pay the usual Commission of Two per cent. on the amount of Freight on signing Bills of Lading.

10. Average, if any, shall be settled according to the York-Antwerp Rules, 1924. Should the Vessel put into any Port or Ports leaky or with damage, the Captain or Owners shall without delay inform the Charterers thereof.

11. Loading hours not to commence before 9 a.m. on and if Ship be not ready in loading dock as ordered before 9 a.m. on or if any wilful misrepresentation be made respecting the size, position or state of the Vessel, Charterers to have the option of cancelling this Charter, such option to be declared on notice of readiness being given.

12. The Charterers' liability shall cease as soon as the Cargo is shipped, and the advance of Freight, Dead Freight, and Demurrage in loading (if any) are paid, the Owners having a lien on the Cargo for Freight, Demurrage and Average.

13. Penalty for non-performance of this Agreement, proved damages, not exceeding the estimated amount of Freight.

14. The Brokerage of Five per cent. is due to on the Cargo being loaded.

BILL OF LADING (*b*).

Shipped at in good order and condition by of in and upon the good Steamship called the whereof is Master for this present Voyage and bound for with liberty to sail without Pilots, to call at any ports in any order, for bunkering or other purposes or to make trial trips

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(*b*) *Ante*, p. 87.

Forms.

after notice or adjust compasses all as part of the contract voyage.

A cargo of Coal of tons Colliery weight, weight shipped unknown, which is to be delivered in the like good order and condition at the said Port of unto or assigns he or they paying Freight for the same as per Charter-Party dated 19 , all the terms, conditions and exceptions contained in which Charter-Party are herewith incorporated.

General Average payable according to York-Antwerp Rules, 1924.

All the terms, provisions and conditions of the Carriage of Goods by Sea Act, 1924, and the Schedule thereto, are to apply to the Contract contained in this Bill of Lading, and the Owners and the Charterers are to be entitled to the benefit of all privileges rights and immunities contained in such Act, and the Schedule thereto, as if the same were herein specifically set out, the unit under Article IV. (5) being the ton. If, or to the extent that, any term of this Bill of Lading is repugnant to or inconsistent with anything in such Act or Schedule it shall be void.

In witness whereof the Master or Agent of the said Vessel hath signed Bills of Lading, all of this tenor and date, drawn as a set consecutively numbered, any one of which being accomplished the others shall be void.

19 .

POLICY OF MARINE INSURANCE (*c*).

Lloyd's S.-G. policy.

Be it known that as well in own name as for and in the name and names of all and every person or persons to whom the same doth, may, or shall appertain, in part or in all doth make assurance and cause and them, and every of them, to be insured, lost or not lost, at and from . Upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called the (*d*) whereof is master under God, for

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(*c*) See *ante*, p. 238. This is the form given in the First Schedule to the Marine Insurance Act, 1906 (6 Edw. 7, c. 41).

(*d*) If the thing assured is sufficiently described, an error in the name of the ship is not material: *Ionides* v. *Pacific Ins. Co.* (1871), L. R. 6 Q. B. 674; 7 *id.* 517.

this present voyage, or whosoever else shall go for master in the said ship, or by whatsoever other name or names the said ship, or the master thereof, is or shall be named or called; beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship, upon the said ship, &c., , and so shall continue and endure, during her abode there, upon the said ship, &c. And further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever, shall be arrived at upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety; and upon the goods and merchandises, until the same be there discharged and safely landed. And it shall be lawful for the said ship, &c., in this voyage, to proceed and sail to and touch and stay at any ports or places whatsoever, without prejudice to this insurance. The said ship, &c., goods and merchandises, &c., for so much as concerns the assured by agreement between the assured and assurers in this policy, are and shall be valued at (*e*).

Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage: they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people (*f*), of what nation, condition, or quality soever, barratry of the master and mariners (*g*), and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, &c., or any part thereof.

Sue and labour clause.

And in case of any loss or misfortune it shall be lawful to the assured, their factors servants and assigns, to sue (*h*), labour, and travel for, in and about the defence, safeguards, and recovery of the said goods and merchandises, and ship, &c., or any part thereof, without prejudice to this insurance, to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured. And it is especially declared and agreed that no acts of the insurer or insured, in recovering, saving, or preserving the property insured shall be considered as a waiver, or acceptance of abandonment. And it is agreed by us, the insurers, that this writing or policy of assurance shall be as of much force and effect as the surest writing or policy of

Waiver clause.

(*e*) *Ante*, p. 242.
(*f*) *Ante*, p. 239.
(*g*) *Ante*, p. 239.
(*h*) This is termed "the suing and labouring clause."

Forms.

assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we, the assurers, are content and do hereby promise and bind ourselves, each one for his own part (*i*), our heirs, executors, and goods to the assured, their executors, administrators, and assigns for the true performance of the premises, confessing ourselves paid the consideration due to us for this assurance by the assured at and after the rate of .

IN WITNESS whereof we, the assurers, have subscribed our names and sums assured in London.

Memorandum.

N.B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship stranded—sugar, tobacco, hemp, flax, hides and skins, are warranted free from average, under five pounds per cent., and all other goods, also the ship and freight, are warranted free from average, under three pounds per cent., unless general, or the ship be stranded.

RULES FOR CONSTRUCTION OF POLICY (*k*).

The following are the rules for the construction of a policy in the above or other like form, where the context does not otherwise require:—

"Lost or not lost."

1. Where the subject-matter is insured "lost or not lost," and the loss has occurred before the contract is concluded, the risk attaches, unless at such time the assured was aware of the loss, and the insurer was not.

"From."

2. Where the subject-matter is insured "from" a particular place, the risk does not attach until the ship starts on the voyage insured.

"At and from."

3.—(a) Where a ship is insured "at and from" a particular place, and she is at that place in good safety when the contract is concluded, the risk attaches immediately.

Ship.

(b) If she be not at that place when the contract is concluded, the risk attaches as soon as she arrives there in good safety, and, unless the policy otherwise provides, it is immaterial that she is covered by another policy for a specified time after arrival.

(*i*) Marine Insurance Act, 1906, s. 67.

(*k*) These are referred to in s. 30 of the Act of 1906, and are set out in the First Schedule to the Act.

Forms.

Freight.

(c) Where chartered freight is insured "at and from" a particular place, and the ship is at that place in good safety when the contract is concluded, the risk attaches immediately. If she be not there when the contract is concluded, the risk attaches as soon as she arrives there in good safety.

(d) Where freight, other than chartered freight, is payable without special conditions and is insured "at and from" a particular place, the risk attaches *pro ratâ* as the goods and merchandise are shipped; provided that if there be cargo in readiness which belongs to the shipowner, or which some other person has contracted with him to ship, the risk attaches as soon as the ship is ready to receive such cargo.

"From the loading thereof."

4. Where goods or other moveables are insured "from the loading thereof," the risk does not attach until such goods or moveables are actually on board, and the insurer is not liable for them while in transit from the shore to the ship.

"Safely landed."

5. Where the risk on goods or other moveables continues until they are "safely landed," they must be landed in the customary manner and within a reasonable time after arrival at the port of discharge, and if they are not so landed the risk ceases.

Touch and stay "at any port or place whatsoever."

6. In the absence of any further licence or usage, the liberty to touch and stay "at any port or place whatsoever" does not authorise the ship to depart from the course of her voyage from the port of departure to the port of destination.

'Perils of the seas."

7. The term "perils of the seas" refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves.

"Pirates."

8. The term "pirates" includes passengers who mutiny and rioters who attack the ship from the shore.

"Thieves."

9. The terms "thieves" does not cover clandestine theft, or a theft committed by any one of the ship's company, whether crew or passengers.

Restraint of princes.

10. The term "arrests, &c. of kings, princes, and people" refers to political or executive acts, and does not include a loss caused by riot or by ordinary judicial process.

Barratry.

11. The term "barratry" includes every wrongful act wilfully committed by the master or the crew to the prejudice of the owner, or, as the case may be, the charterer.

"All other perils."

12. The term "all other perils" includes only perils

similar in kind to the perils specifically mentioned in the policy.

"Average unless general."

13. The term "average unless general" means a partial loss of the subject-matter insured other than a general average loss, and does not include "particular charges."

Stranded.

14. Where the ship has stranded, the insurer is liable for the excepted losses, although the loss is not attributable to the stranding, provided that when the stranding takes place the risk has attached, and, if the policy be on goods, that the damaged goods are on board.

"Ship."

15. The term "ship" includes the hull, materials, and outfit, stores and provisions for the officers and crew, and, in the case of vessels engaged in a special trade, the ordinary fittings requisite for the trade, and also, in the case of a steamship, the machinery, boilers, and coals and engine stores, if owned by the assured.

"Freight."

16. The term "freight" includes the profit derivable by a shipowner from the employment of his ship to carry his own goods or movables, as well as freight payable by a third party, but does not include passage money.

"Goods."

17. The term "goods" means goods in the nature of merchandise, and does not include personal effects or provisions and stores for use on board. In the absence of any usage to the contrary, deck cargo and living animals must be insured specifically, and not under the general denomination of goods (*l*).

FORM OF LETTERS PATENT (*m*).

George V., by the grace of God, of Great Britain, and Ireland, and the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India: to all to whom these presents shall come greeting:

Whereas hath declared that he is in possession of an invention for , that he claims to be the true and

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(*l*) See *Blackett* v. *Royal Exch. Ins. Co.* (1832), 2 Cr. & J. 250; 37 R. R. 695; *Milward* v. *Hibbert* (1842), 3 Q. B. 120; *Apollinaris Co.* v. *Nord Deutsche Co.*, [1904] 1 K. B. 252.

(*m*) *Ante*, p. 275 This is the form given in the Third Schedule to the Patents Rules, 1920, made under the Patents and Designs Acts, 1907 and 1919 (7 Edw. 7, c. 29 and 9 & 10 Geo. 5, c. 80).

first inventor (*n*) thereof, and that the same is not in use by any other person to the best of his knowledge and belief:

And whereas the said inventor hath humbly prayed that a patent might be granted unto him for the sole use and advantage of his said invention:

And whereas the said inventor (hereinafter, together with his executors, administrators and assigns, or any of them, referred to as the said patentee) hath by and in his complete specification (*o*) particularly described the nature of his invention:

And whereas We, being willing to encourage all inventions which may be for the public good, are graciously pleased to condescend to his request:

Know ye, therefore, that We, of our especial grace, certain knowledge, and mere motion, do by these presents, for us, our heirs, and successors, give and grant unto the said patentee our especial licence, full power, sole privilege and authority, that the said patentee by himself, his agents, or licensees, and no others, may at all times hereafter during the term of years herein mentioned, make, use, exercise, and vend the said invention within our United Kingdom of Great Britain and Ireland, and Isle of Man, in such manner as to him or them may seem meet, and that the said patentee shall have and enjoy the whole profit and advantage from time to time accruing by reason of the said invention, during the term of fourteen years from the date hereunder written of these presents: And to the end that the said patentee may have and enjoy the sole use and exercise and the full benefit of the said invention, we do by these presents, for us, our heirs and successors, strictly command all our subjects whatsoever within our United Kingdom of Great Britain and Ireland, and the Isle of Man, that they do not at any time during the continuance of the said term of fourteen years either directly or indirectly make use of or put in practice the said invention, or any part of the same, nor in anywise imitate the same, nor make or cause to be made any addition thereto or subtraction therefrom, whereby to pretend themselves the inventors thereof, without the consent, licence, or agreement of the said patentee in writing under his hand and seal, on pain of incurring such penalties as may be justly inflicted on such offenders for their contempt of this our Royal command, and of being answerable to the patentee according to law for his damages thereby occasioned: Provided always that these letters patent shall be revocable on any of the grounds from time to time by law prescribed as grounds for revoking letters patent granted by

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(*n*) *Ante*, p. 289.

(*o*) *Ante*, p. 130.

Forms.

Us, and the same may be revoked and made void accordingly: Provided also, that if the said patentee shall not pay all fees by law required to be paid in respect of the grant of these letters patent, or in respect of any matter relating thereto at the time or times, and in manner for the time being by law provided; and also if the said patentee shall not supply, or cause to be supplied, for our service all such articles of the said invention as may be required by the officers or commissioners administering any department of our service (*p*), in such manner, at such times, and at and upon such reasonable prices and terms as shall be settled in manner for the time being by law provided, then, and in any of the said cases, these our letters patent, and all privileges and advantages whatever hereby granted, shall determine and become void notwithstanding anything hereinbefore contained: Provided also, that nothing herein contained shall prevent the granting of licences in such manner and for such considerations as they may by law be granted: And lastly, We do by these presents for us, our heirs and successors, grant unto the said patentee that these our letters patent shall be construed in the most beneficial sense for the advantage of the said patentee. In witness whereof We have caused these our letters to be made patent and to be sealed as of the one thousand nine hundred and .

[*Here is to be inserted the name of the Comptroller-General.*]
Comptroller-General of Patents,
Designs and Trade Marks.

(Seal of Patent Office.)

BILL OF SALE (*q*).

Form in Schedule to Bills of Sale Act, 1882.

This Indenture made the day of , between A. B., of of the one part, and C. D., of of the other part, witnesseth that in consideration of the sum of £ now paid to A. B. by C. D., the receipt of which the said A. B. hereby acknowledges [*or whatever else the consideration may be*], he the said A. B. doth hereby assign unto C. D.,

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(*p*) *Ante*, p. 289.

(*q*) Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), Schedule. See *ante*, p. 130.

Forms.

his executors, administrators, and assigns, all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £ , and interest thereon at the rate of £ per cent. per annum [*or whatever else may be the rate*]. And the said A. B. doth further agree and declare that he will duly pay to the said C. D. the principal sum aforesaid, together with the interest then due, by equal payments of £ on the day of [*or whatever else may be the stipulated times or time of payment*]. And the said A. B. doth also agree with the said C. D. that he will [*here insert terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security*].

Provided always, that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said C. D., for any cause other than those specified in section seven of the Bills of Sale Act (1878) Amendment Act, 1882.

In witness, &c.

Signed and sealed by the said A. B. in the presence of me E. F. [*add witness's name, address, and description*].

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"A very sound treatise, distinctly above the average. This book supplies a long-felt want. The whole field is covered in an interesting manner, unusual in a work which does not claim to be anything more than an outline."—*New Cambridge.*

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THOMAS & BELLOT'S Leading Cases in Constitutional Law. With Introduction and Notes. Sixth Edition. By H. H. L. BELLOT, LL.D. Formerly Acting Professor of Constitutional Law in the University of London. 352 pages. Price 10s. 6d. net. 1927

Some knowledge of the chief cases in constitutional law is now required in many examinations, and is obviously necessary to the thorough student of constitutional history. This book extracts the essence of the cases with which the student is expected to be familiar, preserving always something of the concrete circumstance that is so helpful to the memory. It adds, where necessary, a short note to the individual case, and subjoins to each important group of cases some general remarks in the shape of a note. The cases are so arranged as to be convenient for ready reference.

MINTY'S Constitutional Laws of the British Empire, By L. Le M. MINTY, Barrister-at-Law. 253 pages. Price 15s. net. 1928

So far as possible the author has included sufficient material to enable a student to give a possible answer to every question that has been set for the LL.B. in the past few years, or is likely to be set in the near future.

TASWELL-LANGMEAD'S English Constitutional History. From the Teutonic Invasion to the Present Time. Designed as a Text-book for Students and others. Ninth Edition. By A. L. POOLE, M.A., F.S.A., Fellow and Tutor, St. John's College, Oxford. 758 pages. Price 21s. net. 1929

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WILSHERE'S Analysis of Taswell-Langmead's Constitutional History. By A. M. WILSHERE, LL.B., Barrister-at-Law. 133 pages. Price 6s. 6d. net. 1929

HAMMOND'S Short English Constitutional History for Law Students. By EDGAR HAMMOND, B.A. 163 pages. Price 7s. 6d. net. 1920

An excellent book for the purpose of refreshing one's knowledge preparatory to taking an examination.

"An excellent cram-book and a little more. The tabulation of the matter is excellent."—*Law Times.*

GARSIA'S Constitutional Law and Legal History in a Nutshell. Including an Alphabetical Table of Writs and their Uses, a Comparative Table of the Constitutions of Canada, Australia and South Africa. Second Edition. By M. GARSIA, Barrister-at-Law. 104 pages. Price 4s. net. 1925

"I have looked over this book and find that it is admirably adapted for its purpose. For almost any type of student it should be invaluable if judiciously used with the standard Text Book."—*A Law Lecturer.*

CONTRACTS.

All You Want for the Bar Final. See page 19.

ODGERS on the Common Law. See page 7.

WILSHERE'S Outline of Contracts and Torts. By A. M. WILSHERE and DOUGLAS ROBB, Barristers-at-Law. Third Edition. 155 pages. Price 7s. 6d. net. 1928

It is designed as an assistance to the memory of the Student who has read Odgers or Indermaur on the Common Law.

CARTER on Contracts. Elements of the Law of Contracts. By A. T. CARTER, of the Inner Temple, Barrister-at-Law, Reader to the Council of Legal Education. Sixth Edition. 272 pages. Price 12s. 6d. net. 1925

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SALMOND & WINFIELD on Contracts. Principles of the Law of Contract. By the late Sir JOHN W. SALMOND and P. H. WINFIELD, Barrister-at-Law. 544 pages. Price 30s. net. 1927

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CONVEYANCING.

(See also Real Property.)

ELPHINSTONE'S Introduction to Conveyancing. By Sir HOWARD WARBURTON ELPHINSTONE, Bart. Eighth Edition, by HARRY FARRAR, Barrister-at-Law, Editor of Key and Elphinstone's Precedents in Conveyancing. [*In the press.*

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DEANE & SPURLING'S Elements of Conveyancing, with an Appendix of Students' Precedents. Fourth Edition, by W. LYON BLEASE, Barrister-at-Law. Price 17s. 6d. net. 1925

This book is complementary to and extends the information in Williams, and Deane and Blease's Real Property. It deals with the Acts of 1925. The reader is taken through the component parts of Purchase Deeds, Leases, Mortgage Deeds, Settlements and Wills, and the way in which these instruments are prepared is explained. Previous to this is a short history of Conveyancing, and a chapter on Contracts for Sale of Land dealing with the statutory requisites, the form, particulars and conditions of sale, the abstract of title, requisitions, etc., and finally there is a chapter on conveyance by registration. The second part of the book, covering about 100 pages, contains CLARK'S STUDENTS' PRECEDENTS IN CONVEYANCING, illustrating the various documents referred to in the first part. It is the only book containing a representative collection of precedents for students.

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CRIMINAL LAW AND PROCEDURE.

ODGERS on the Common Law. See page 7.

GARSIA'S Criminal Law and Procedure in a Nutshell. Fourth Edition. By M. GARSIA, Barrister-at-Law. 110 pages. Price 4s. net. 1929

Enumerates and classifies the more important crimes, gives a short history of the Criminal Courts and a brief outline of criminal procedure.

HARRIS'S Principles and Practice of the Criminal Law. Intended as a Lucid Exposition of the subject for the use of Students and the Profession. Fourteenth Edition. By A. M. WILSHERE, Barrister-at-Law. 576 pages. Price 15s. net. 1926

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Criminal Law and Procedure—*continued.*

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This book sets out concisely the essential principles of the criminal law and explains in detail the most important crimes, giving precedents of indictments; it also gives an outline of criminal procedure and evidence.

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DICTIONARY.

The Concise Law Dictionary. By P. G. OSBORN, Barrister-at-Law. 333 pages. Price 15s. net. 1927

A book every student should have for general reference. It deals with existing law and with legal history. Legal maxims are translated, and there are glossaries of Latin, French and Early English words relating to the law. There is also a list of abbreviations used in citing law reports. A very useful feature is a digest of some four hundred leading cases.

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SNELL'S Principles of Equity. Intended for the use of Students and Practitioners. Twentieth Edition. By H. G. RIVINGTON, M.A. Oxon., and A. C. FOUNTAINE. 595 pages. Price £1 10s. net. 1929

"In a most modest preface the editors disclaim any intention to interfere with Snell as generations of students have known it. Actually what they have succeeded in doing is to make the book at least three times as valuable as it ever was before. Illustrations from cases have been deftly introduced, and the whole rendered simple and intelligible until it is hardly recognisable."—*The Students' Companion.*

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BLYTH'S Analysis of Snell's Principles of Equity, with Notes thereon. By E. E. BLYTH, LL.D., Solicitor. Fourteenth Edition. 275 pages. Price 10s. 6d. net. 1929

"This is an admirable analysis of a good treatise; read with Snell, this little book will be found very profitable to the student." —*Law Journal.*

GARSIA'S Equity in a Nutshell. By M. GARSIA, Barrister-at-Law. 76 pages. Price 3s. 6d. net. 1928

STORY'S Commentaries on Equity Jurisprudence. Third English Edition. By A. E. RANDALL. 641 pages. Price 37s. 6d. net. 1920

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In this book the author has endeavoured to *explain* and enable the student to *understand* Equity. He has incorporated a large number of explanations from the authorities and has tried to make the subject intelligible while at the same time he has as much useful and relevant detail as the larger students' works. It is not a mere "cram" book.

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WHITE & TUDOR'S Leading Cases in Equity. A Selection of Leading Cases in Equity; with Notes. Ninth Edition. By E. P. Hewitt, K.C. 2 vols. Price £4 10s. net. 1928

"'White and Tudor' towers high above all other works on Equity. It is the fountain of Equity, from which all authors draw and drink. It is the book we all turn to when we want to know what the Judges of the old Court of Chancery, or its modern representative, the Chancery Division, have said and decided on this or that principle of law. It is the book in which counsel in his chambers puts such faith, and from which in Court counsel reads with so much confidence. It is the book from the law of which Judges hesitate to depart."—*Law Notes.*

EVIDENCE.

All You Want for the Bar Final. See page 19.

COCKLE'S Leading Cases and Statutes on the Law of Evidence, with Notes, explanatory and connective, presenting a systematic view of the whole subject. By Ernest Cockle, Barrister-at-Law. Fourth Edition. By S. L. Phipson. 533 pages. Price 18s. 6d. net. 1925

This book and Phipson's Manual are together ***sufficient*** for all ordinary examination purposes, and will save students the necessity of reading larger works on this subject.

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Evidence—*continued.*

it. Just enough of the headnote, the facts, and the judgments are selected and set out to explain the point fully without boring the reader; ***and the notes*** appended to the cases ***contain all the additional information that anyone can require in ordinary practice."***—*Solicitors' Journal.*

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WROTTESLEY on the Examination of Witnesses in Court. Including Examination in Chief, Cross-Examination, and Re-Examination. With chapters on Preliminary Steps and some Elementary Rules of Evidence. Second Edition. By F. J. WROTTESLEY, of the Inner Temple, Barrister-at-Law. 173 pages. Price 6s. net. 1929

This is a practical book for the law student. It is interesting, and is packed full of valuable hints and information. The author lays down clearly and succinctly the rules which should guide the advocate in the examination of witnesses and in the argument of questions of fact and law, and has illustrated the precepts which he has given by showing how they have been put into actual practice by the greatest advocates of modern times.

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The Concise Law Dictionary (*ante*, p. 15) is an indispensable book of reference.

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The questions are grouped logically under subjects, and references are given to text books where the answers will be found.

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STEELE'S Articled Clerk's Guide to and Self-Preparation for the Final and Honours Examinations. Containing a Complete Course of Study, with Books to Read, Test Questions, Regulations, &c., and intended for the use of those Articled Clerks who read by themselves. Incorporating Indermaur's Articled Clerk's Guide. Second Edition. By E. A. STEELE and G. R. J. DUCKWORTH, Solicitors, Principals of the Halifax Law Classes. Price 5s. net. 1926

This book tells you what are the best books to read, how and when to read them, gives test questions to be answered at the various stages of reading and a set of questions and answers. Even if you are being coached, you will find many useful hints and much sound advice in it.

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WALKER'S Compendium of the Law relating to Executors and Administrators. Sixth Edition, embodying the effect of the Acts of 1925. By S. E. WILLIAMS, of Lincoln's Inn, Barrister-at-Law. 386 pages. Price £1 5s. net. 1926

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NEWPORT on Income Tax Law and Practice. By C. A. NEWPORT, F.C.R.A., Corporate Accountant. Third Edition, 303 pages. Price 10s. 6d. net. 1929

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PORTER'S Laws of Insurance: Fire, Life, Accident, and Guarantee. Embodying Cases in the English, Scotch, Irish, American, Australian, New Zealand, and Canadian Courts. Seventh Edition. 505 pages. Price £1 12s. 6d. net. 1925

INTERNATIONAL LAW.

(See also Conflict of Laws.)

BENTWICH'S Students' Leading Cases and Statutes on International Law, arranged and edited with notes. By NORMAN BENTWICH, Barrister-at-Law. With an Introductory Note by Professor L. OPPENHEIM. 247 pages. Price 12s. 6d. net. 1913

"This Case Book is admirable from every point of view, and may be specially recommended to be used by young students in conjunction with their lectures and their reading of text-books." —*Professor Oppenheim.*

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By Pitt Cobbett, M.A., D.C.L. Oxon. Fourth Edition. By H. H. L. Bellot, D.C.L.

Vol. I. "Peace." 365 pages. Price 16s. net. 1922
Vol. II. "War and Neutrality." 671 pages. Price £1 5s. net. 1924

"The book is well arranged, the materials well selected, and the comments to the point. Much will be found in small space in this book."—*Law Journal.*

"The notes are concisely written and trustworthy. . . . . The reader will learn from them a great deal on the subject, and the book as a whole seems a convenient introduction to fuller and more systematic works."—*Oxford Magazine.*

JURISPRUDENCE.

SALMOND'S Jurisprudence; or, Theory of the Law. By John W. Salmond, Barrister-at-Law. Seventh Edition. 559 pages. Price £1 net. 1924

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LEADING CASES.

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(See also Constitutional Law; Dictionary.)

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The main idea of this work is to present, under the head of "Maxims," certain leading principles of English law, and to illustrate some of the ways in which those principles have been applied or limited, by reference to reported cases. The maxims are classified under the following divisions:—

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SMITH'S Law of Master and Servant. Seventh Edition. By C. M. KNOWLES, Barrister-at-Law. 350 pages. Price 25s. net. 1922

MERCANTILE LAW.

CHARLESWORTH'S Principles of Mercantile Law. By J. CHARLESWORTH, Barrister-at-Law. 360 pages. Price 8s. net. 1929

SMITH'S Mercantile Law. A Compendium of Mercantile Law, by the late JOHN WILLIAM SMITH. Twelfth Edition. By J. H. WATTS, Barrister-at-Law. 881 pages. Price £2 2s. net. 1924

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STRAHAN & OLDHAM'S Law of Partnership. By J. A. STRAHAN, Reader of Equity, Inns of Court, and N. H. OLDHAM, Barristers-at-Law. Fifth Edition. 264 pages. Price 10s. net. 1927

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WILLIAMS' Principles of the Law of Personal Property, intended for the use of Students in Conveyancing. Eighteenth Edition. Adapted to the Acts of 1925. By T. CYPRIAN WILLIAMS, of Lincoln's Inn, Barrister-at-Law. 739 pages. Price £1 10s. net. 1926

"Whatever competitors there may be in the field of real property, and they are numerous, none exist as serious rivals to Williams' Personal. For every law student it is invaluable, and to the practitioner it is often useful."—*Law Times.*

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WILSHERE'S Analysis of Williams on Personal Property. Fourth Edition. 114 pages. Price 7s. 6d. net. 1923
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PRIVATE INTERNATIONAL LAW.

(See Conflict of Laws.)

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ODGERS on the Common Law. See page 7.

INDERMAUR'S Manual of the Practice of the Supreme Court of Judicature, in the King's Bench and Chancery Divisions. Tenth Edition. Intended for the use of Students and the Profession. By CHARLES THWAITES, Solicitor. 495 pages. Price £1 net. 1919

"The arrangement of the book is good, and references are given to the leading decisions. Copious references are also given to the rules, so that the work forms a convenient guide to the larger volumes on practice. It is a very successful attempt to deal clearly and concisely with an important and complicated subject."—*Solicitors' Journal.*

WILSHERE'S Outlines of Procedure and Evidence. With some facsimile forms. For the Use of Students. By A. M. WILSHERE, Barrister-at-Law, Fourth Edition. 183 pages. Price 11s. 6d. net. 1929

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GARSIA'S Civil Procedure in a Nutshell. With numerous specimens and examples of Writs, Pleadings, Summonses and Orders in use in the King's Bench Division. 70 pages. Price 3s. 6d. net. 1927

ODGERS' Short Account of the English Courts of Law. Reprinted from the Third Edition of Odgers on the Common Law. Price 3s. 6d. net. 1929

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WILLIAMS' Principles of the Law of Real Property. Intended as a first book for the use of Students in Conveyancing. Twenty-fourth Edition. By R. A. EASTWOOD, Barrister-at-Law, Professor of Law at the University of Manchester. 832 pages. Price £1 10s. net. 1926

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